



2002

# Annual Report

Attorney General of Washington

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# Welcome!

*It is with great pride that I present the Washington Attorney General's Office Annual Report for 2002.*

*This annual report highlights many of the major cases and issues the Attorney General's Office has handled in the past year on behalf of all citizens of Washington*



*State. During this time we have worked on issues ranging from protecting consumer rights, standing up for the state's most vulnerable citizens, and preserving the state's pristine and valuable natural resources. The office serves clients in more than 230 state agencies, boards and commissions, as well as the state's community colleges and universities.*

*I believe the Attorney General's Office is one of the premier law offices of the state and I am proud of the work we do each and every day. The employees of the office are among the most dedicated, outstanding and committed public employees I've worked with, and they work hard to represent the interests of Washington citizens.*

*I hope the information contained in this report will be informative and helpful in understanding the work we do on a daily basis.*

*Sincerely,*

A handwritten signature in blue ink that reads "Christine O. Gregoire". The signature is written in a cursive, flowing style.

*Christine O. Gregoire  
Attorney General*



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# Office-Wide Initiatives



## High Tech Crime

### SafetyNet Campaign

Attorney General Christine Gregoire began a multi-faceted effort to educate children and consumers about ways they can protect themselves from criminals and con artists on the Internet. She has visited schools and talked to kids, parents and educators about steps they can take to protect children on line. The office is

also working with businesses to distribute information about unsolicited e-mail, or spam, and has expanded and improved the Internet-safety information provided on its web site, including links to a wide range of useful information showing how consumers can protect themselves from Internet con artists and criminals.

**"Attorney General Gregoire continued her efforts to reduce incidences of youth violence in schools and communities across the state."**

## Youth Violence and Bullying

Attorney General Gregoire continued her efforts to reduce incidences of youth

violence in schools and communities across the state.

### Anti-Bullying Legislation

Following the passage of the anti-bullying legislation in the 2002 Legislative Session, the Attorney General's Office helped draft the model policy on bullying, and worked with the Office of the Superintendent of Public Instruction and the Washington

Association of School Principals to design the anti-bullying training. Gregoire also led a series of anti-bullying discussions with students in the West Valley School District in Spokane.

### Teen Dating Violence Web Site

To raise awareness about teen dating violence, the Attorney General's Domestic Violence Action Committee launched a web site to provide information that will hopefully lead to healthier teen dating relationships. With U.S. Department of Justice surveys showing that dating violence is not uncommon among teens, Attorney General Gregoire believes

that raising awareness of teen dating relationship abuse is the first step in its prevention. The web site contains information about safety plans, communication skills, assertiveness, conflict resolution, emotion management, and faulty relationship and gender role expectations that will help students handle tough situations.

## Stewards of Justice Award Recipients

Two employees were selected personally by Attorney General Gregoire to receive the office's Stewards of Justice Award. The award was created in 1998 by Gregoire to

recognize employees who have made an extraordinary difference in people's lives - both professionally and personally. These individuals were honored for dedication

# Office-Wide Initiatives

**"The Legislature passed an anti-bullying bill that was proposed by the Attorney General, Governor Gary Locke and Superintendent of Public Instruction Terry Bergeson."**

- to their profession, fellow employees and the communities in which they live and work.
- Recipients of the Fifth Annual Stewards of Justice Award were presented to Milt Ruffins, Paralegal, Labor and Personnel Division and Scott Wessel-Estes, Assistant Attorney General, Regional Services Division. Gregoire also presented a special Steward of Justice Award to Walter Dellinger, Professor at Duke University School of Law.

## United States Supreme Court Arguments

- The Attorney General's Office successfully represented the Department of Social and Health Services in a case before the United States Supreme Court that determined the department may use Social Security benefits to help meet the basic needs of foster children. The case, *Washington State Department of Social and Health Services, et al., v. Guardianship Estate of Danny Keffeler, et al.*, was originally filed in Okanogan County Superior Court in 1995. The case is a class-action lawsuit filed on behalf of all past, present, and future foster children for whom the department acts as "representative payee" to receive Social Security payments on their behalf. The state argued that federal law authorizes the department to use the benefits to help cover the costs of the children's food, clothing and shelter. In October 2001, the Washington State Supreme Court ruled that the department could not use the Social Security benefits to provide for basic needs. The U.S. Supreme Court ruled in February 2003 in favor of the Department.

## Legislation

### Anti-Bullying Legislation

- The Legislature passed an anti-bullying bill that was proposed by the Attorney General, Governor Gary Locke and Superintendent of Public Instruction Terry Bergeson. The bill requires every school district to enact policies that prohibit harassment, intimidation and bullying and to offer anti-bullying training to teachers. An active coalition of more than 50 special interest groups and organizations supported the bill.

### Risk Management Legislation

- Attorney General Gregoire and Governor Locke requested three bills that were passed to help protect the public and reduce the number of multi-million dollar lawsuits against the state. The first bill moves the Office of Risk Management out of the Department of General Administration to the Office of Financial Management to raise the profile of risk management efforts. The second allows the state to issue an expression of regret to victims and/or family members of people hurt or killed while in state care or on state property. The third bill permits an agency to do a post-incident review of major incidents without fear the findings will be used against them in court. This legislation was the result of the work of a task force created by Gregoire and



## Office-Wide Initiatives

Locke. The group was tasked with making sure the state had the most effective risk management policies possible and issued a report in 2001 with several recommendations to help protect the

public and reduce the number of multi-million dollar lawsuits against the state. Some of those recommendations were implemented administratively and others required action from the Legislature.

### Protecting Public Records

This bill was the result of the terrorist attacks of September 11, 2001, and serves to protect sensitive public records that could aid terrorists. The new law exempts from inspection vulnerability assessments,

response deployment plans, records currently prohibited from disclosure by federal law, and notes or summaries from national security briefings.

### Credit Scoring

The new law, co-sponsored by the Attorney General's Office and the Office of the Insurance Commissioner, prohibits the use of a misleading and unfair practice called credit scoring, to deny, cancel or fail

to renew an individual's personal line of insurance. It also ensures a consumer's credit score cannot cause more than a 20 percent difference in premiums.

**"The new law exempts from inspection vulnerability assessments, response deployment plans, records currently prohibited from disclosure by federal law, and notes or summaries from national security briefings."**

# Solicitor General Team

## ● SUMMARY OF RESPONSIBILITY

- The Solicitor General Team was created in 1993. Its role is to provide the following services:
  - Coordinate cases at the appellate levels in both state and federal courts, and conduct appellate assistance and review programs for the Attorney General's Office;
  - Coordinate the office's involvement with cases in the United States Supreme Court;
  - Be primarily responsible for the preparation of formal Attorney General Opinions;
  - Coordinate the office's involvement with amicus curiae "Friend of the Court" briefs in all courts;
- Carry out the Attorney General's duties with respect to the preparation of ballot titles and explanatory statements, and represent the state in litigation involving the powers of initiative and referendum;
- Coordinate legal advice on issues of statewide significance;
- Chair the Ethics Committee, the office's primary resource on matters of professional responsibility;
- Serve as the office's liaison to the state bar association;
- Serve as legal counsel to the Secretary of State, Lieutenant Governor, Office of Financial Management, and the Administrator for the Courts.

## ● LEGAL SERVICES PROVIDED

- A large part of the team's role is consulting with other divisions of the office concerning appellate practice, or coordinating the office's client advice on issues of statewide significance. The team has primary or exclusive responsibility for several major cases, and a secondary role in dozens of others. The Solicitor General Team also provides a great deal of legal advice through the preparation of formal opinions and interpretative memoranda, consultation with other divisions, or directly to agencies.

## ● NUMBERS/TRENDS

- The team received notice of approximately 246 new appeals and formally consulted with other divisions concerning appeal questions or other strategies in approximately 175 cases.

## Solicitor General Team

- The team arranged conferences with the Attorney General in 30 cases before the Washington State Supreme Court.
- The team coordinated practice arguments in 83 appellate cases.
- Between December 1, 2001, and December 1, 2002, the office received 61 opinion requests for processing. Thirty-one were accepted. Thirty requests were rejected because the requests involved matters in litigation or were not within the scope of the statute on Attorney General Opinions. During the same period, the office cleared 33 opinions. Seven formal opinions were issued on subjects as diverse as whether mole traps are “body-gripping” traps, when a felon’s firearm rights can be restored, and which territory must be included in PUD commissioner districts. Twenty-two were issued as informal opinions on a wide variety of topics. Four opinion requests were handled by a general letter but not by a written opinion.
- Between December 1, 2001, and December 1, 2002, the team reviewed 109

requests for participation as amicus curiae or “Friend of the Court.” Of the 109 requests, the office joined or authored 48 briefs. Six briefs supported petitions for certiorari to the United States Supreme Court and 15 briefed the merits of cases accepted by the United States Supreme Court. The office was the sole or primary author of 18 amicus briefs filed in various courts.

- Between January and December 1, 2002, members of the team processed 45 ballot measure titles, consisting of 24 Initiatives to the People, 16 Initiatives to the Legislature, four referendum measures, and one constitutional amendment. Eight initiatives/referenda were withdrawn. Four of these measures were certified for the 2002 general election; two were Initiatives to the People, one was a constitutional amendment, and one was a referendum. The team provided explanatory statements for the Voters Pamphlet on these four measures. Three ballot titles and two referenda titles were appealed to the superior court. One appeal was later withdrawn by the initiative sponsor.

**"Seven formal opinions were issued on subjects as diverse as whether mole traps are “body-gripping” traps, when a felon’s firearm rights can be restored, and which territory must be included in PUD commissioner districts."**

## SIGNIFICANT CASES AND ISSUES

**Legal Services For The Indigent:** A member of the Solicitor General Team is participating in defending an ethical rule of the Washington Supreme Court, that governs lawyers and other licensed legal professionals. The rule requires client trust funds held by a legal professional to be placed in an interest-bearing account for the client, whenever the client’s funds can earn net interest for the client. If the client’s funds cannot earn net interest for the client, typically when they are small or held for a short period, the rule requires the funds to be deposited in a pooled interest-bearing account with like funds of other clients. Interest earned on the pooled account is paid to the Legal Foundation of Washington and is

distributed to organizations providing legal services for low-income persons. A nonprofit law center, two licensed legal professionals, and two clients whose funds were deposited in a pooled interest-bearing account under the rule, allege that the rule takes their property in violation of the Fifth Amendment and is invalid under the First Amendment. The Ninth Circuit Court of Appeals rejected the Fifth Amendment challenge, and remanded the First Amendment claim to the district court. The United States Supreme Court granted certiorari on the claim that the rule takes property in violation of the Fifth Amendment. The case is awaiting decision.

# Solicitor General Team

**"Political parties filed a lawsuit against the Secretary of State in federal court in Washington, challenging the continued use of the blanket primary in this state. Judge John Burgess of the U.S. District Court granted summary judgment in favor of the state and upheld the blanket primary."**

- **Tuition Grants:** A member of the Solicitor General Team and an attorney in the Education Division successfully defended Washington’s Educational Opportunity Grant Program against a challenge that it violates state and federal constitutional provisions relating to church and state. The program provides a modest tuition grant to needy adult students so that they may complete their final two years of college, pursuing a secular course of study, at a public or private institution of higher education. The plaintiff contended that the grant program is constitutionally impermissible to the extent that it is available to students who choose to attend religiously affiliated institutions of higher education. The state Supreme Court upheld the program in a decision issued in June.
- **Blanket Primary:** Since 1936 Washington has used a system known as the “blanket primary” as a means of qualifying candidates for elected office to the general election ballot. Under this system, voters can vote for any candidate of their choice at the primary, without limitation based on party affiliation. In 2000 the United States Supreme Court ruled that California could not continue to use that state’s blanket primary system over the objection of the political parties. Political parties filed a lawsuit against the Secretary of State in federal court in Washington, challenging the continued use of the blanket primary in this state. Judge John Burgess of the U.S. District Court granted summary judgment in favor of the state and upheld the blanket primary. The political parties have appealed to the Ninth Circuit, where the case has been briefed and will be argued February 6, 2003. Attorneys from the Solicitor General Team and the Attorney General’s complex litigation unit are defending that lawsuit.
- **Voting Rights Of Convicted Felons:** The Washington Constitution makes convicted felons ineligible to register and vote until their civil rights have been restored upon completion of their sentences. A group of convicted felons filed suit in federal court, alleging that this restriction conflicts with the federal Voting Rights Act. An attorney from the Solicitor General’s Team, along with an attorney in the Criminal Justice Division, have defended the state’s constitutional provision. In December 2000, a federal judge ruled that the state’s provision is legal and does not conflict with federal law. The matter is currently pending on appeal before the Ninth Circuit.
- **Methodology Used To Calculate Workers’ Compensation Premiums:** A member of the Solicitor General’s Team worked with attorneys in the Labor and Industries Division (L&I) to prepare a brief for the Washington Supreme Court in a case challenging the methodology used by L&I to calculate the premiums for workers compensation insurance. The Supreme Court ruled in favor of L&I and upheld its methodology.
- **Use Of Social Security Benefits To Pay For Foster Care:** The Solicitor General Team, working with attorneys from the Social and Health Services Division, defended a challenge to the Department of Social and Health Service’s (DSHS) use of social security benefits to pay for a child’s foster care. When a child is declared dependent and placed in foster care with the DSHS, the department

## Solicitor General Team

applies for social security benefits on behalf of the child. If DSHS is appointed by the Social Security Administration as the child's representative payee, it uses the benefits to pay for the cost of the child's foster care in accordance with the rules of the Social Security Administration. The Washington Supreme Court ruled that it

was improper for the department to use benefits to pay for the cost of care. The United States Supreme Court issued a stay and granted DSHS's petition for a writ of certiorari. The case was argued by Attorney General Gregoire and the office is awaiting a decision.

**Petition Method of Annexation:** In *Grant County Fire Protection District v. Moses Lake*, the fire protection district challenged the constitutionality of the petition method of annexation. A member of the Solicitor General's Team wrote an amicus brief arguing that the petition method is constitutional. Later, the state Supreme Court issued a decision ruling

that the petition method violated article I, section 12 of the Washington Constitution. A member of the Solicitor General's Team wrote an amicus brief, on behalf of the Governor, supporting the city's motion for reconsideration. The court granted the motion for reconsideration and called for additional briefing and oral argument.

**Initiative 732:** The Solicitor General's Team, working with an attorney from the Education Division, defended two lawsuits challenging the Legislature's implementation of Initiative 732, which requires a yearly cost-of-living pay raise for school district employees. The Legislature funded the cost-of-living increases for state-funded employees but did not fund increases for school district employees hired with local school district funds. The plaintiffs argue that the state must fund cost-of-living increases for all school district employees. The

Thurston County Superior Court granted summary judgment in favor of the state. The plaintiffs appealed the case to the Washington Supreme Court. The court reversed the trial court. It held that the Initiative applied to all school district employees. The court also ruled that the provision of the Initiative stating that the cost-of-living increases were constitutionally required as part of basic education was invalid. The court severed this unconstitutional provision from the remainder of Initiative 732.

**Initiative 773:** The Solicitor General's Team is defending Initiative 773 against a lawsuit by sellers of tobacco products. Initiative 773 increased cigarette and other tobacco taxes to fund low-income health care and other programs. The challengers contend that Initiative 773 fails to satisfy constitutional requirements governing

appropriations and requiring bills to contain a single subject expressed in the bill title. The Thurston County Superior Court upheld the Initiative and the plaintiffs appealed. The case is awaiting decision by the Washington Supreme Court.

**"The Solicitor General's Team is defending Initiative 773 against a lawsuit by sellers of tobacco products. Initiative 773 increased cigarette and other tobacco taxes to fund low-income health care and other programs."**

[illegible]

public institutions. One member of the Solicitor General's Team represented the governor, who intervened in the case on the side of the petitioners. Another team member represented the secretary of state. The case was originally argued in September and the court declined to rule due to lack of time before the election. Referendum 53 was rejected by the voters and the coalition filed a new petition in the Supreme Court. The governor intervened again. A second oral argument was held and we are awaiting a decision.

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# **Protecting Consumers and Legitimate Businesses**

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# Antitrust Division

**"The majority of the division's work focuses on representing consumers and state agencies in litigation seeking redress for violations of antitrust laws."**

## ● Summary of Responsibility

- The Antitrust Division enforces state and federal laws protecting consumers and businesses from anticompetitive practices such as price-fixing, bid rigging, monopolization and other conduct that interferes with fair competition.

The division also is charged with independently reviewing, or helping the Insurance Commissioner's review of, insurance companies' conversions to for-profit status.

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## ● Legal Services Provided

- The majority of the division's work focuses on representing consumers and state agencies in litigation seeking redress for violations of antitrust laws.

The division also provides legal counsel to state agencies concerning antitrust-related matters.

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## ● Numbers/Trends

- The division continues to investigate the cause of the energy crisis of 2001, as part of a multistate effort. The Williams Companies, Inc., and Williams Energy Marketing and Trading (Williams Companies) have agreed to pay \$15 million to Washington for consumer restitution and investigative costs and fees, for their participation in any alleged wrongdoing. The investigation continues as to other major energy producers.

Approximately \$370,000 will be distributed to charitable organizations as final settlement of the case settled with manufacturers of the drugs clorazepam and lorazepam.

- Major music distributors and retailers will pay approximately \$67 million in consumer restitution and \$75 million worth of music compact discs to settle a multistate, national claim that they were fixing prices of music compact discs. Washington consumers will be eligible to file claims against the consumer restitution amount and approximately \$1.5 million worth of the compact discs will be sent to selected charitable or educational institutions.

Salton, Inc., has agreed to pay Washington approximately \$200,000 as settlement of claims that its resale price maintenance policy concerning George Foreman grills was illegal.

The division has three lawsuits pending against pharmaceutical manufacturers, obtained divestiture relief in one oil and gas merger, challenged a media merger in federal court and has investigated several others mergers without challenging them.

The division is assisting the Insurance Commissioner in his review of the proposed Premera Blue Cross conversion to for-profit status.



## Antitrust Division

### Significant Cases and Their Impact

**Energy Investigation:** Washington, California and Oregon have been investigating the causes of the energy crisis of 2000-2001. Numerous documents have been reviewed and witnesses have been interviewed. Several of the target companies are also the subject of federal criminal investigations or regulatory proceedings, thus creating procedural

complexities. However, a settlement has been reached with the Williams Companies. Williams will pay a total of \$15 million, for consumer restitution and investigative costs and fees, to Washington over the next three years. The investigation continues against several companies, many of which are now facing financial difficulties.

**CDs:** Several compact disc manufacturers, distributors and retailers have agreed to pay a national settlement amount of approximately \$143 million, including \$67.3 million in cash and \$75.5 million worth of CD products, as settlement of claims that they engaged in resale price maintenance. A consumer restitution claims program will take place, which will

result in either direct consumer restitution or indirect restitution, depending on the number of claims filed. The CD products will be distributed to charitable organizations or governmental entities and Washington entities will receive approximately \$1.5 million worth of the CDs products.

**Conoco Phillips:** Phillips Petroleum Company and Conoco, Inc., were allowed to merge only after they agreed to make major concessions to state and federal regulators, including agreeing to sell a

gasoline terminal in Spokane. Without the divestiture, the merged entity would have controlled two out of the three terminals in that region.

**Salton, Inc.:** Health and nutrition programs in Washington will receive as much as \$200,000 from a national antitrust settlement with the manufacturer of the George Foreman Grill. After a two-year investigation, 44 states filed suit claiming that Salton illegally coerced retailers

into fixing the price for Salton's George Foreman grills, and into excluding Salton's competitors from store shelves. The states further alleged that Salton refused to supply retailers with the popular grills if they stocked a competitor's product or sold competitors' products at a discount.

**Taxol:** Washington and 31 other states sued Bristol-Myers Squibb, the maker of Taxol, a drug used to treat ovarian, breast and other cancers. The states allege that the company withheld material information

from, and otherwise deceived, the U.S. Patent Office, in an effort to keep generic competition off the market. The matter is pending in federal court in Washington DC.

**Buspar:** Washington and 33 other states have sued Bristol-Myers Squibb, alleging that BMS filed false declarations with the U.S. Patent Office, in an effort to prevent

generic competition from competing with Buspar, an anti-anxiety medication. This matter is pending before a federal court in New York.

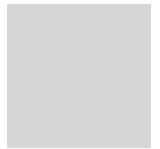
**"Several compact disc manufacturers, distributors and retailers have agreed to pay a national settlement amount of approximately \$143 million, including \$67.3 million in cash and \$75.5 million worth of CD products, as settlement of claims that they engaged in resale price maintenance."**

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# Consumer Protection Division



## Summary of Responsibility

The Consumer Protection Division enforces consumer protection laws to help keep the Washington marketplace free of deceptive and unfair practices. The division investigates and files legal actions to stop fraudulent and deceptive practices, to recover refunds for consumers, and to impose penalties on offending businesses, as well as recover attorneys fees and costs incurred in taking such action. The division facilitates the informal resolution of consumer problems by notifying businesses of written complaints and mediating those complaints. It provides information and education to businesses and to the public on consumer rights

and issues, and it sends out alerts when consumers or businesses are targeted for fraudulent or predatory activities.

The division is also responsible for the administration of Washington's law for new motor vehicle warranty enforcement. Known as the "Lemon Law," this law helps owners of new vehicles with continuing warranty repairs. Services provided include arbitration to resolve consumer and manufacturer warranty disputes, consumer and industry education and enforcement of manufacturer and dealer obligations.

**"The division seeks to educate the public about its rights and responsibilities as well as remind legitimate businesses of the proper way to do business in Washington."**

## Legal Services Provided

**Overall Priorities:** In 2002, the division emphasized efforts to educate, mediate and undertake enforcement actions in four key areas: telecommunications,

predatory lending, matters affecting health and safety (including vehicle and medical issues), and the Internet.

**Education:** The division provides information to consumers and businesses of the state. The division seeks to educate the public about its rights and responsibilities as well as remind legitimate businesses of the proper way

to do business in Washington. Recently, the division completed translation of the six most requested consumer brochures into Russian and Spanish and is currently working to place the translated versions of the brochures on the office web site.

**Mediation:** The division provides informal mediation of consumer complaints. Six Consumer Resource Centers (CRCs) (located in Bellingham, Seattle, Tacoma, Vancouver, Kennewick, and Spokane) are staffed by division employees, volunteers,

and students to handle consumer inquiries and complaints against businesses. The staff notifies businesses of written complaints and attempts to informally mediate those complaints to help settle disputes between businesses and

## Consumer Protection Division

**"The division's six CRCs fielded more than 185,600 phone calls (a 4 percent increase over 2001), greeted more than 1,700 "walk-ins," and processed more than 24,200 complaints (a 15 percent increase over 2001)."**

- consumers. The division is working with programs, such as the University of Washington Law School's Legal Clinic,
- .....

- **Enforcement:** The division investigates cases and takes enforcement action when necessary. If a business engages in conduct that involves unfair or deceptive practices, legal action may be taken to recover consumer refunds, assess civil penalties, and recover costs and attorney fees. The legal team works closely with other states, and with other agencies, such as the U.S. Department of Justice, the

to provide additional informal mediation resources for consumers and businesses.

Federal Trade Commission (FTC), as well as with federal and county prosecutors to refer cases, conduct investigations and prosecute individuals who commit crimes against consumers. Filing temporary restraining orders, freezing bank accounts and coordinating search warrants with the filing of civil complaints are all part of cooperative enforcement efforts.

### Numbers/Trends

- The division undertook investigation and enforcement actions in 2002, including leading and participating in multi-state cases, which resulted in record levels of recoveries, topped by the \$484 million national settlement with Household Finance.

- Of the total recoveries, more than \$21.5 million will be disbursed to Washington consumers as direct restitution. More than \$1.2 million was obtained in reimbursement for investigation and attorney fees and costs incurred by the division. Almost \$270,000 in civil penalties were paid and \$50,000 in penalties were suspended. And, about \$800,000 will go to fund consumer education programs in Washington State.

- Informal mediation of consumer complaints against businesses by the CRCs without litigation or enforcement action resulted in more than \$5.6 million in additional restitution to Washington consumers.

The division provided the following services to Washington consumers and businesses:

- The division's six CRCs fielded more than 185,600 phone calls (a 4 percent increase over 2001), greeted more than 1,700 "walk-ins," and processed more than 24,200 complaints (a 15 percent increase over 2001).
- The division's High Tech Unit separately handled contacts, complaints and requests for information through the Cyber CRC via the web. The Cyber CRC received about 9,200 consumer complaints on-line, and more than 8,200 e-mail spam complaints.
- The Lemon Law program separately handled more than 14,000 telephone calls, almost 46,000 web site contacts and 620 e-mails. Almost 1,500 new car warranty arbitration packets were mailed out, and more than 1,000 were downloaded from the program's web pages. More than 300 requests for arbitrations were handled involving more than \$15 million in vehicle value.

## Consumer Protection Division

### Significant Cases and Developments and Their Impact

#### Multi-State and National Cases and Settlements

**Household Finance:** Attorney General Gregoire worked to craft groundbreaking provisions and a record-setting \$484 million in consumer restitution in a national settlement with Household Finance involving alleged predatory lending practices. Gregoire worked with the state Department of Financial Institutions and the Office of the Insurance Commissioner, and officials from Arizona, Iowa, Illinois, New York and Minnesota in leading the final negotiations. Twenty-one million dollars will go to Washington consumers who were overcharged for home loans issued by Household in the largest direct consumer restitution

settlement ever. The case involved an unprecedented collaboration by Attorney General offices, banking regulators and insurance regulators to achieve groundbreaking provisions, including:

- capping total fees and points;
- prohibiting mandatory credit insurance;
- limiting prepayment penalties;
- requiring that loans result in a tangible benefit to consumers; and
- auditing and monitoring requirements.

The settlement is expected to set new standards of conduct for the so-called sub-prime home lending industry.

**Qwest Settlement:** Qwest Communications agreed to establish new customer service standards and make restitution to customers who paid for unwanted or misrepresented products and services. Qwest also agreed to pay \$500,000 to the state's general fund and \$500,000 for consumer education and \$300,000 to reimburse the state's investigation and attorneys fees and costs, in addition to providing restitution for unwanted products and services. Qwest is to improve customer service by:

- using Washington state-based employees to respond to Washington consumer

complaints; fully investigating complaints within 35 days;

- allowing consumers dissatisfied with a proposed resolution to speak to a manager with decision-making authority within 2 days;
- providing consumers with written confirmation of new or changed service, a description of how new features work, and a toll-free number for consumers to ask questions; and
- hiring a third party to monitor Qwest's performance and to identify illegal practices or poor customer service.

**Ford Settlement:** Attorney General Gregoire led final negotiations resulting in a national \$51.5 million settlement with Ford Motor Co., manufacturer of the popular Explorer sport utility vehicles (SUVs) that have been linked to rollover accidents and 271 deaths and 700 injuries nationwide. The settlement comes a year after attorneys general reached a similar \$51.5 million settlement with

Bridgestone/Firestone, maker of tires installed as original equipment on the Ford Explorer. Ford will pay \$30 million for a national consumer education campaign to advise drivers, particularly those unfamiliar with trucks, about safe SUV driving and loading. The campaign will focus on all SUVs, not just those made by Ford. Besides providing funding for the safety campaign, the settlement

**"Attorney General Gregoire led final negotiations resulting in a national \$51.5 million settlement with Ford Motor Co., manufacturer of the popular Explorer sport utility vehicles (SUVs) that have been linked to rollover accidents and 271 deaths and 700 injuries nationwide."**

## Consumer Protection Division

**"The state will use \$250,000 of its share of the Firestone/Bridgestone settlement and \$100,000 of its share of the Ford settlement in the spring and summer of 2003 to supplement a \$5 million national tire-safety media campaign."**

- agreement contains other provisions aimed at improving motorist safety, such as provisions which:
  - prohibit Ford from making misrepresentations about SUV cargo capacity, safety and handling characteristics, or the purpose of any recall or recommended inspection. This includes prohibiting Ford from using the term "car-like" in advertising with respect to the steering and handling of its SUVs;
  - require the company to use reliable, scientific evidence to back-up claims
- related to vehicle safety, performance or durability;
- require the company to provide safety information about cargo loading and vehicle handling to each consumer who buys a Ford SUV.

Although no Washington residents have been killed or injured as a result of Ford Explorer rollovers connected to tire failures, there have been 26 reports of tire failures in the state.

- **Firestone/Bridgestone Tires Settlement:** The Attorney General's Office launched an initiative to educate the public about tire safety. In cooperation with the National Highway Traffic Safety Administration (NHTSA), the office distributed nearly 10,000 NHTSA-produced tire safety brochures through its CRCs and through 65 Department of Licensing Drivers' License Offices statewide. Distribution of the brochures is the first phase of a tire-safety education effort funded in part with money from last November's \$51.5 million settlement between the
- nation's attorneys general and Firestone/Bridgestone, the manufacturer of tires linked to hundreds of deaths and injuries nationwide. The state will use \$250,000 of its share of the Firestone/Bridgestone settlement and \$100,000 of its share of the Ford settlement in the spring and summer of 2003 to supplement a \$5 million national tire-safety media campaign. The campaign will stress the importance of regularly checking tire wear and inflation pressure, regularly rotating tires to ensure even wear, and reminding motorists of the relationship of safety to load, speed and tire pressure.

- **Weyerhaeuser Agreement:** The Weyerhaeuser Company agreed to pay more than \$130,000 to help pay for a study into the performance of engineered wood siding in Pacific Northwest climates. The agreement ends an investigation into whether the firm misrepresented their siding product's performance. Two
- years ago, Weyerhaeuser agreed to address consumer claims in private class action lawsuits and set aside \$82 million for claims, to be paid over nine years. Under the terms of the agreement with the state, the results of the two-year study will be widely shared throughout the building and wood products industries.

- **Citibank Agreement:** A settlement agreement between Citibank and several states, including Washington, provides for new restrictions on the use of personal financial information that the bank shares with direct marketers. The agreement controls how telemarketing and other direct sales firms use credit-card numbers and other personal information obtained from Citibank. The conditions require:
  - Citibank's review and approval of all marketing materials;
  - compliance with all consumer protection laws by telemarketers; and
  - clear approval by cardholders prior to any charges.
- The Citibank settlement followed the agreement in 2000 with BrandDirect to pay \$11 million in restitution to as many as 2.7 million people, 30,000 of whom

## Consumer Protection Division

live in Washington, for abusing consumer information obtained from several major financial institutions including Citibank,

and the agreement, also in 2000, with US Bank on practices of sharing credit-card information with marketers.

### Internet Cases and Settlements

**State Prevails in E-Mail Spam Case:** In another significant victory for Washington's anti-spam law, a King County Superior Court judge declared that misleading commercial e-mail sent to millions of people violated Washington's 1998 statute. Almost \$100,000 in penalties and attorneys fees and costs were assessed. The case is only one of several

cases that have been filed by the AGO targeting e-mail spam and porn-promoting spammers. In a recent settlement, a Minneapolis-based spammer who sent out thousands of e-mail spam is enjoined from further violation of Washington's anti-spam law and required to pay \$10,000 in investigation and attorneys fees and costs.

**On-Line Cancer Cure Site Shut Down:** In addition to ordering restitution, imposing penalties and assessing costs and fees, the state obtained court orders against an Olympia man to permanently shut down an Internet web site he used to promote a cancer treatment with no

proven record of success. The claimed treatments and the asserted success rates touted on the web site were not based on any objective, competent, or reliable scientific evidence and were feared to potentially cause patients harm.

**States Settle With Internet Advertising Service:** Washington and nine other states settled with DoubleClick, the nation's leading Internet-advertising service, requiring the company to better inform consumers when the company gathers information about the web-surfing activities of Internet users. The agreement will make it easier for consumers to know when their visits to particular web sites are being tracked through the use of "cookies." A "cookie" is a file left on a personal computer after a visit to a web site. The "cookie" registers visits to subsequent web sites, and that information can then be accessed the next time the user visits the site which

attached the initial "cookie" tracking. The information about the user's web-surfing habits can then be used to target specific advertising to that web surfer. Because of the number of on-line advertisers and web sites that contract with DoubleClick for Internet advertising services, nearly every computer user sooner or later is tagged with DoubleClick "cookies." Web sites that contract with DoubleClick will have to inform consumers in their privacy policies that they are using "cookies." The company is also working to develop a "cookie viewer" that will enable consumers to see the information stored on their computers.

### Other Significant Cases And Settlements

**"Free Electricity" Promoter Shut Down:** A court order was obtained to shut down the activities of Dennis Lee, a New Jersey promoter of a "free electricity"

scheme who held seminars in which he claimed that technology he had developed would enable consumers to be completely free of electric utility bills. Lee attempts

**"In another significant victory for Washington's anti-spam law, a King County Superior Court judge declared that misleading commercial e-mail sent to millions of people violated Washington's 1998 statute."**

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**"Contest America Publishers agreed to take steps to ensure that consumers who enter its contests understand the rules, including a requirement that they will have to pay additional fees to solve so-called "tie-breaker" puzzles which are necessary to keep them in the running for alleged valuable prizes."**

to sell “dealerships” for his products. Some “dealerships” are reported to have sold for as much as \$100,000. A Spokane Superior Court judge ordered Lee to pay \$64,000 in fines and attorneys’ fees and

to buy back the “dealerships” sold to any Washington purchasers who are dissatisfied. Six other states have filed similar suits against Lee.

**Vancouver Car Dealer Accused Of Abusive Sales Tactics:** A Vancouver, Washington, car dealer who depleted a 69-year-old mentally impaired man's retirement savings by selling him 18 cars in 14 months was required to pay full restitution, \$15,000 in civil penalties,

and \$17,000 in attorney fees and costs. This was in addition to a separate, private settlement reached between the dealership and the man's lawyer that restored the man's savings and left him with a new vehicle.

**Company Agreed To Not Mislead Consumers In Puzzle Contest:** A Missouri company that misled Washington consumers, many of them elderly, into believing they could win big prizes by solving supposedly easy puzzles agreed to discontinue misleading consumers and to offer refunds to consumers. Contest America Publishers agreed to take steps to ensure that consumers who enter its contests understand the rules, including a requirement that they will

have to pay additional fees to solve so-called “tie-breaker” puzzles which are necessary to keep them in the running for alleged valuable prizes. The contests were misleading since entry-level games were easy, but puzzles in subsequent “tie-breaker” rounds were significantly more difficult and virtually impossible for the vast majority of contestants to answer accurately in order to qualify for promised prizes.

## Door-To-Door Vacuum Cleaner Sales Ring Shut Down:

Three members of a door-to-door vacuum sales ring that used high-pressure sales tactics on elderly consumers in Eastern Washington were required to pay \$30,000 in consumer restitution and \$20,000 in attorney's fees. If the three fail to satisfactorily

resolve a single complaint after resuming business, they can be permanently barred from door-to-door vacuum cleaner sales in Washington. The settlement also provides for \$50,000 in civil penalties that are suspended on the condition that the terms of the settlement are met.

**“Gifting” Pyramid Scheme Defendants Penalized \$56,000:** Nine people named in a lawsuit filed against organizers of a “Gifting Club” pyramid scheme in the

Tri-Cities area settled with the state and agreed to pay \$56,136 in civil penalties, costs and fees.



## Consumer Protection Division

### Other Initiatives

#### **Privacy Paper Provides Consumers And Business With Best Practices Tips:**

With as many as 94 percent of Americans concerned about possible misuse of personal information, the Attorney General's Office, in conjunction with the UW School of Law and Technology, issued a report on privacy. The report provides consumers and businesses with a menu of "best practices" -- examples of clear and effective privacy-policy disclosures and the

way a business can safeguard consumer privacy. The report also encourages and provides ways for consumers to look for those safeguards when doing business off-line and on-line. The paper spells out what ideal privacy policies should contain and address. The report also calls on businesses to post privacy policies in clear, simple language, in the form of a one-page summary, with the full text of the privacy policy available for review.

#### **State Joins Regional Internet Scam "Sweep":**

In April, the office joined the FTC and 14 other agencies from other western states and two Canadian provinces in announcing the filing of more than two dozen Internet-fraud enforcement actions. The "sweep" culminated an 18-month effort of training to identify, investigate, prepare cases against Internet scams in collaboration with the FTC, and agencies in Alaska, Idaho, Montana, Oregon, Wyoming, British Columbia and Alberta.

Washington has succeeded in actions against:

- a Bremerton-based Internet seller of "work at home opportunities," which were largely non-existent;
- a Kent-based seller of musical instruments which sent damaged and sub-standard instruments to consumers or did not deliver at all; and,
- a Seattle-based travel broker who sold discount tickets using frequent flyer miles and failed to deliver promised tickets.

#### **Participation In Cross-Border Odometer Tampering Investigation:**

Consumer Protection staff in Spokane took an active role in assisting state and federal agencies in investigating five Spokane area used car dealers who were allegedly active participants in an odometer rollback scheme involving vehicles imported to the United States from Canada. The investigation resulted in federal criminal indictments of five

Washington and two Canadian dealers who were charged with mail fraud, money laundering, and altering odometers. The case involves 122 late-model vehicles whose odometers were rolled back in Canada or in the United States when they were converted from kilometers to miles. The indictments charge that some of the odometers were rolled back as much as 50,000 miles, substantially inflating the retail values of the vehicles.

# Public Counsel Section

**"Public Counsel is an important voice for consumers on utility issues of technical complexity and an important resource for policy-makers seeking to understand the effects of decisions on Washington utility customers."**

## ● Summary of Responsibility

- The Public Counsel Section represents consumers who would not otherwise have an effective voice regarding the rates, services, and business practices of the investor-owned telephone, electric and natural gas utilities operating in the state.
- Cases are conducted and issues presented in proceedings before Washington's Utilities and Transportation Commission (WUTC), in state court, and in other forums as appropriate.

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## ● Legal Service Provided

- The Public Counsel Section advocates for the interests of consumers in major rate cases and other cases before the WUTC, by presentations at WUTC bi-weekly business meetings, through technical study groups, in court appeals, and before the Legislature and other policy makers.
- The section maintains contact with the public through a citizen advisory committee, community organizations, personal contact, and letters and telephone calls from consumers in major rate cases. The citizen advisory committee is appointed by the Attorney General to provide a sounding board for utility issues of concern to citizens. Its 15 members come from all over the state and from various backgrounds and interests. The committee meets five times a year to provide advice and to learn about current utility issues.

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## ● Significant Cases and Their Impact

### ● Energy

- **Puget Sound Energy Electric (PSE) Rate Case Settlement:** The WUTC approved a settlement agreement among Public Counsel, PSE, the commission staff and over 20 other parties that limited PSE to a 4.6 percent overall electric rate hike, and required the company to embark on a broad, new energy conservation program and provide new assistance to low-income customers. The settlement approved by the WUTC limits PSE to an electric revenue increase of \$59 million, far less than the \$228 million (16.5 percent) the company requested when it filed in December 2001.
- The agreement also:
  - Made significant changes to PSE's "Time of Use" (TOU) pilot plan that charges some consumers varying rates depending on the time of day power is used (a program ultimately discontinued after data showed most customers paid more under TOU than under standard flat rates);
  - Implemented a doubling of the company's energy conservation program;
  - Implemented a new \$8.6 million low-income assistance program for electric and gas customers; and

## Public Counsel Section

- Continued a “Service Quality Index,” under which it provides an annual service quality report card to custom-

ers and pays financial penalties of up to \$10 million if it fails to meet specified customer service targets.

**PSE Natural Gas Rate Case Settlement:** The WUTC approved a settlement regarding the company’s natural gas rates that allows PSE to increase rates by an average of 5.8 percent, which provides

a revenue boost of \$35.6 million a year, well below the \$82 million the company originally sought to cover its operating costs.

**Avista Electric Rate Case Settlement:** The WUTC approved a settlement involving Public Counsel that resolved all outstanding issues in the general rate case. Instead of the \$53.2 million dollar increase in base rates (a 22.5 percent increase) Avista originally requested, the agreement limits Avista to \$45.7 million dollars (a 19.3 percent increase). Since

the commission had previously approved an emergency increase, however, the settlement meant ratepayers would see no additional increase. Under the agreement Avista and its shareholders will absorb approximately half of the high cost of long term gas contracts. Avista had asked to recover 90 percent from ratepayers.

**Federal Issues:** While the office primarily focuses on state regulatory issues, activities by the Federal Energy Regulatory Commission (FERC) have become increasingly significant for Washington consumers. In particular, the office has opposed efforts by FERC

to continue and expand deregulation of the wholesale electricity markets in the face of the recent Western energy crisis as such efforts go beyond federal jurisdiction and threaten important Northwest public interests.

### Telecommunications

**Qwest Sale of Yellow Pages (DEX) Business:** Qwest sought approval by the WUTC for the sale and transfer of its Yellow Pages directory business (Qwest Dex) to a buyout group led by the Carlyle Group for a total purchase price is \$7.05 billion. The costs and revenues associated with directory publishing have been considered part of the local phone company operations since the breakup of AT&T in 1984. The WUTC

has consistently maintained a policy of "imputing" yellow pages revenues to Qwest or its predecessors, and the Washington Supreme Court upheld that practice in 1997. Loss of yellow pages revenues could have a significant impact on customer rates. Public Counsel is participating in this adjudication in order to preserve ratepayers interest in the benefits of the yellow pages asset.

**Qwest Long-Distance Application (Telecom Act Section 271):** As in an incentive to bring competition to the local telecommunications market, pursuant to Section 271 of the Federal Telecommunications Act of 1996 (Telecom Act), Regional Bell Operating

Companies such as Qwest have the opportunity to enter their regional interstate long distance markets. To do this Qwest must demonstrate compliance with, among other things, a 14 point “competitive checklist” of items intended to demonstrate that it has opened its local

**"While the office primarily focuses on state regulatory issues, activities by the Federal Energy Regulatory Commission (FERC) have become increasingly significant for Washington consumers."**

# Public Counsel Section

**"The WUTC ultimately recommended FCC approval of Qwest's requests, but adopted a number of Public Counsel recommendations regarding systems for competitors to interface with Qwest as they serve customers."**

- markets to competition. Public Counsel participated in proceedings before the WUTC and recommended denial of the Qwest petition on the ground of inadequate local competition. The WUTC ultimately
- **US West 1995 Rate Case Refund Settlement:** In 1997, the Washington Supreme Court upheld the commission's 1995 decision reducing US West's rates by more than \$90 million and ordering the company to refund over \$200 million to consumers. At the end of the refund process, Public Counsel believed there remained significant unreturned funds. In fall 2000, a negotiated settlement was approved by the state court under which Qwest agreed to contribute \$26 million to projects designed to benefit telecommunications customers. The court approved distribution of funds to the a number of projects, including:
  - E911 network improvements \$5.30 million;
  - Community voice mail \$0.65 million;
  - Telemedicine services \$3.92 million;
  - K-20 libraries projects \$5.03 million;
  - Community economic development \$5.00 million;
  - Consumer education and outreach \$2.00 million;
  - Provision of service to unserved areas \$0.90 million; and
  - Network infrastructure improvements \$3.13 million.
- **US West/Qwest Merger:** The approval conditions for the 2000 Qwest/US West merger which continue to benefit customers include a three-year rate freeze, infrastructure improvements, protection against consumers bearing the costs of the merger, customer specific service guarantees (e.g., bill credits for service failures), and a Service Quality Performance Program under which Qwest must pay up to \$20 million per
- year in credits to customers if it fails to meet service quality requirements. Public Counsel has been reviewing and monitoring company compliance with the merger conditions, particularly in the area of service quality. In calendar year 2001, the first full year when Qwest's service quality is measured under the performance program, Qwest was required to pay \$3.2 million in customer credits.

## Major Issues/Events

- **Electric Utilities - Aftermath of the Energy Crisis:** The years 2000 and 2001 saw some of the most extreme wholesale energy prices on record, driven substantially by the California market debacle and compounded by historic drought conditions in the Northwest. The region suffered severe economic impacts, including plant closures and layoffs. The crisis has created upward pressure on electric rates (see energy cases above) and increased the importance of energy efficiency programs. Efforts by FERC to continue deregulatory efforts in the wholesale market are creating serious concerns for consumers in the Pacific Northwest.

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**Telecommunications:** The movement towards a competitive telecommunications industry, especially at the local level, has a long way to go and has created much litigation. Nearly seven years ago, Congress passed the landmark Telecommunications Act of 1996, which requires local companies to open parts of their networks for the use of competitors, with payment at a fair price. In the wake of the act, the WUTC has been examining

universal service, access charges, and prices for unbundled elements, and other competition issues. Other major issues include service quality concerns, particularly for large local phone companies and enforcement of conditions attached to approved mergers involving Washington's largest local telephone companies, GTE (now "Verizon") and US West (now "Qwest").

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## **Preserving Washington's Health and Environment**

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# Agriculture and Health Division

## Summary of Responsibility

The Agriculture and Health Division provides legal advice and litigation services to the Department of Health and its associated boards, commissions and committees; the State Board of Health; the Health Care Authority; the Department of

Agriculture; 24 Commodity Commissions; the Department of Community, Trade and Economic Development; the Northwest Compact on Low Level Radioactive Waste Management and the newly created Home Care Quality Authority.

## Legal Services Provided

The division provides a full range of legal representation to its clients, including both legal advice and litigation services. The work involves the oversight of health care practitioners and facilities, regulation of activities posing threats to human health such as food processing, the conveyance of public drinking water, the application of pesticides and the disposal of radioactive materials. Other major efforts include assisting the Department of Health and the Board of Health in their bioterrorism preparedness planning; adoption of isolation and quarantine rules; and implementation of agency-wide public disclosure training. The division advises the Health Care Authority and Public Employees Benefits Board with respect to state employees' health care benefits and the basic health plan. The division's work with the Department of Community, Trade

and Economic Development includes assisting with its outreach to other state agencies and local governments on the Growth Management Act (GMA); providing legal advice to their business development, economic assistance, and international trade programs; and assisting in the review of archaeological site permitting. The division assists the Department of Agriculture in eradicating and controlling serious plant pests, such as the Gypsy Moth and Citrus Longhorned Beetle; and enforcing the grades and standards laws related to shipping and exporting billions of dollars worth of this state's agricultural products. The division advises and represents its client agencies in their implementation of legislative initiatives to promote community and economic development and public health.

**"The work involves the oversight of health care practitioners and facilities, regulation of activities posing threats to human health such as food processing, the conveyance of public drinking water, the application of pesticides and the disposal of radioactive materials."**

## Numbers/Trends

Most of the division's Department of Health litigation caseload involves administrative disciplinary actions against health professionals. While the number of cases has remained relatively constant with a great majority of cases resolved prior to hearing, those that proceed to hearing

have become increasingly complex. Rising health care costs, particularly for prescription drugs, and greater difficulty in accessing health care have garnered increasing attention from both the Department of Health and the Health Care Authority.

# Agriculture and Health Division

**"This litigation arose out of the efforts of the Department of Agriculture to prevent the establishment of the Citrus Longhorned Beetle (CLHB) in Western Washington."**

- The Department of Agriculture is responsible for controlling plant and animal pests that threaten the state’s agricultural commodities. Given the increase in the number and extent of proliferation of such pests, we are experiencing increasing tensions in balancing the need for eradication and control with private property interests and environmental concerns.
- The Department of Health and the Department of Agriculture are key agencies in assisting the Governor in counter-terrorism preparedness. The division anticipates continuing involvement in assisting these agencies in preparation for emergency events.

In this last year, the Office of Community Development and the Department of Trade and Economic Development, which had operated as two agencies, were returned to their former structure, i.e. the Department of Community, Trade and Economic Development (CTED). Division involvement in growth management litigation remained modest over the last year after several years of more intensive litigation activity. The Division assisted in several significant training workshops for state agency personnel and local governments to prepare for the 2002 deadline for reviewing and updating local comprehensive plans and development regulations adopted under the Growth Management Act.

## Significant Cases and Their Impact

- **Malbrain and Terrell v. State:** This litigation arose out of the efforts of the Department of Agriculture to prevent the establishment of the Citrus Longhorned Beetle (CLHB) in Western Washington. The CLHB is an invasive pest, which destroys many types of trees. The CLHB arrived in Washington in a shipment of bonsai trees at a nursery in south King County; a few were captured, but more escaped. Upon the advice of a scientific panel, the department sought permission from neighboring property owners to remove the types of trees on their property, which would serve as hosts for the proliferation of the CLHB. Most of the affected property owners consented to the tree removal. The plaintiffs, consisting of three property owners who did not consent, filed a Petition for a Writ of Mandamus in the Washington State Supreme Court, asking the Supreme Court
- **Supporters of the Center v. Department of Labor and Industries:** The Supporters of the Center (SOC), a non-profit organization, received a state grant of

to take original jurisdiction over the case. Plaintiffs wanted to be compensated in advance of the tree removal, arguing that the removal of the trees constituted a “takings” under the Washington and United States Constitutions. The department had filed an action in King County Superior Court to obtain administrative warrants allowing the department to remove trees on the three non-consenting properties. The Supreme Court declined to issue the writ of mandamus and transferred the case to the King County Superior Court. The Superior Court held that an emergency existed, supporting the governor’s emergency order to remove the trees, but the Court also held that the tree removal constituted a “taking” for which compensation was owed in advance of the tree removal. This case is currently on appeal.

\$3.7 million to construct the Wenatchee Performing Arts Center. CTED passed the grant through to the SOC. After the project was substantially completed, L&I



## Agriculture and Health Division

determined that the project was constructed “at the cost of the state” and that the SOC should have paid the workers prevailing wages. The SOC filed a petition for judicial review of L&I’s decision and also brought an action for a declaratory judgment against CTED for the value of any prevailing wages due under RCW 39.12.042. The Thurston County Superior Court ruled that the project was not a public work and dismissed the action against CTED. Whether a partially state

funded project constructed by a non-profit organization is a public work is an issue of first impression in the state of Washington that is now on appeal before Division II of the Court of Appeals. The attorney for SOC is contending that the project is not a public work, but if the Court decided otherwise, is asking that CTED be required to pay the additional wages, despite the agency’s dismissal at the trial court level.

**"The division represented CTED in the most complicated and one of the longest-running cases brought under the Growth Management Act."**

**Lummi Nation v. Golder Associates:** Events associated with the discovery of Indian remains in a project undertaken by the city of Blaine led to a lawsuit filed by the Lummi Tribe in the Western District Court of Washington against an archeology firm. In response, the archeology firm twice challenged the constitutionality of

part of the Washington Indian Graves and Records Act. The division filed an amicus brief on behalf of the Office of Archeology and Historic Preservation (part of DCTED) in support of the Tribe, asserting the Act’s constitutionality. The District Court upheld the Act against the constitutional challenges.

**Manke Lumber Co. v. Central Puget Sound Growth Management Hearings Board:** The division represented CTED in the most complicated and one of the longest-running cases brought under the Growth Management Act (GMA). CTED and other state agencies, along with numerous other parties, challenged Kitsap County’s comprehensive plan adopted in 1994. The board found the plan did not comply with the GMA and invalidated it. The county adopted a

second comprehensive plan in 1996, which the board invalidated in part. The county adopted a third comprehensive plan in 1998, which the board found to be substantially in compliance with the GMA. This appeal arose out of challenges to the 1998 comprehensive plan. CTED joined with Kitsap County in defending the board’s decision regarding the 1998 comprehensive plan. In an unpublished decision issued in May 2002, the Court of Appeals affirmed the board.

**Multicare Health System v. Department of Health:** Multicare Health System, which operates two hospitals in Tacoma, wanted to build a new facility in south King County. The Department of Health ruled the proposal must be reviewed to determine whether a “certificate of need” should be issued. Multicare appealed, claiming the new facility could be operated under its existing license to operate the two

hospitals in Tacoma, and obtained direct review in the Court of Appeals, where the matter is now pending. Several other hospitals have intervened in support of the department. The case involves when and whether the department should exercise its statutory responsibility to assess the need for new or expanded health care facilities in Washington.

**Mader v. State:** Part-time community college employees filed a class action in King County Superior Court against the Board of Community and Technical

Colleges, the Department of Retirement Systems and the Health Care Authority. With respect to the Health Care Authority, plaintiffs alleged entitlement to continued

## Agriculture and Health Division

**"In 2002, the federal government funded bioterrorism response and preparedness grants and the Department of Health applied for and received federal monies to improve public health infrastructure to prepare for and respond to bioterrorism."**

health care benefits during periods when they are not teaching. At the superior court, the agency was affirmed in part and reversed in part. The faculty members appealed the superior court decision and the state filed a cross appeal for discretionary review. The Court of Appeals held the plaintiffs were not entitled to continued

health care benefits when they were not teaching and granted the state's cross appeal. The Washington Supreme Court accepted the employees' petition for review and heard oral arguments in November 2002. A decision is expected in the first half of 2003.

### Major Issues/Events

**Counter-Terrorism Preparedness:** In the fall of 2001, bioterrorism became a major concern to people throughout the country after letters containing anthrax were received in Florida, Washington D.C., and New York. The federal government realized that the public health infrastructure was not equipped to respond to bioterrorism. In 2002, the federal government funded bioterrorism response and preparedness grants and the Department of Health applied for and received federal monies to improve public health infrastructure to prepare for and respond to bioterrorism. We assisted in preparation of the grant, identifying

the legal issues and work necessary to effectively implement the state plan. In late October 2002, the federal government asked states to redirect their bioterrorism response and preparedness planning to one particular bioagent, smallpox. Through the last quarter of 2002, we have worked intensively with the department in preparing its stage one smallpox vaccination plan (pre-event) and its mass vaccination plan (post-event). This work will continue through 2003, as the department is preparing to implement the stage one plan when directed by the federal government.

**Health Insurance Portability and Accountability Act (HIPAA):** This federal legislation and implementing rules have imposed new requirements on health care providers and others with access to health care information. The new requirements, which affect a number of state agencies, including the Department of Health and the Health Care Authority, balance interests in the standardization

and electronic transmission of health care data with strict privacy standards. Implementation of the federal legislation through federal regulations issued by the Department of Health and Human Services has been staged to occur over the next several years. A number of state agencies are coordinating the implementation of this legislation and we are assisting in the coordination.

**WSDA Pest Control Program:** In the fall of 2001, the Department of Agriculture confirmed the introduction of a highly destructive non-native pest, the Citrus Longhorned Beetle, in the Tukwila area. This beetle is destructive to native vegetation and ornamental plants and, if the beetle becomes established, it has the potential to cause great economic loss to the forestry, nursery and agricultural

industries of the state. The division worked with the department to establish a quarantine area in an attempt to control the spread of the beetle. The Governor declared a state of emergency within that area and ordered the removal of host vegetation within a certain distance from the site where the beetles escaped. The division worked with the department in 2002 as it surveyed the affected area, set up

## Agriculture and Health Division

a claims program for any damage caused by the survey work, imposed “hold-orders” on potentially infected materials,

and obtained administrative warrants for entry on private property to remove the susceptible host materials.

**West Nile Virus:** As summer waned in 2002, the Department of Health identified the existence of West Nile Virus in this state; first, in dead crows, then in horses, which became ill, but recovered. In 2003, the department expects the West Nile Virus

to be a major public health concern. The department is working with local health jurisdictions in preparation for the 2003 mosquito season. We are assisting the department in this effort.

**Long-Term Disability Insurance Reserves:** In a routine review of its accounts, the Public Employee Benefits Board discovered its long-term disability insurer had changed its reserves for the board’s account without notice, resulting in a loss on paper of over \$15 million.

The division negotiated a settlement which restored the reserve plus interest, reimbursed the agency for attorneys and experts fees, and revised the policy renewal process to ensure a clearer process and advance notice regarding any changes in contract terms.

**WIC Program:** The division worked with the Department of Health to address fraudulent activities related to the federal Women-Infant-Children program administered by the department to provide nutritional assistance to nursing mothers and small children. In one matter, the department worked with federal authorities to investigate a fraud ring that purchased

infant formula at reduced prices from WIC recipients in Washington and Oregon, then sold the formula in California at substantial markup. In another matter, a corporation fraudulently misused a report generated by the Department of Health in an attempt, ironically, to secure a federal contract to monitor fraud in the WIC program.

**Allied Technology Group Bankruptcy:** The Department of Health licenses Allied Technology Group (ATG) to process low-level radioactive waste at the Hanford Reservation. In November 2001, ATG stopped receiving and processing waste and subsequently filed for bankruptcy. The division, representing the department,

has worked with the bankruptcy trustee, creditors, and other state and federal agencies with regulatory responsibilities at Hanford to ensure the radioactive waste is safely stored and appropriately processed, and, if ATG’s reorganization is unsuccessful, to ensure the site is safely closed and cleaned up.



# Ecology Division

- **Summary of Responsibility**

- The Ecology Division represents the Department of Ecology, Puget Sound Water Quality Action Team, Pollution Liability Insurance Agency, and the State Conservation Commission.

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- **Legal Services Provided**

- The Ecology Division, which is located in Olympia, consists of 22 attorneys, 2 paralegals and 12 professional staff. The division works to resolve environmental problems and disputes using a variety of legal tools including negotiation, multi-party mediation, and litigation when necessary. Division attorneys provide advice on a broad spectrum of matters, including permitting, legislation, rule-making, and enforcement. The division's practice includes hearings before administrative boards as well as trials and appeals before state and federal courts.

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- **Numbers/Trends**

- The cases and projects handled by Ecology Division continue to increase in number and complexity at a time when budget constraints limit the number of staff available to handle any additional workload. As a result, this places a premium on the division's ability to promote efficient resolution of conflicts involving client agencies and on the need for innovative problem-solving approaches to the environmental and natural resource management issues they face.
- The largest area of the division's workload is in the area of water resource allocation and management. The Department of Ecology has dramatically increased its investment in the processing of water rights applications with an attendant increase in litigation involving water rights decisions. In addition, division work to assist Ecology in oversight of the United States Department of Energy's (USDOE's) cleanup of the radioactive waste at Hanford has also intensified as the result of USDOE's recent efforts to accelerate cleanup decisions. Other areas of increased workload over the past year involve the state's regulation of hydroelectric dams, new shorelines guidelines, and major economic development projects such as the Sea-Tac Airport Third Runway Project and the dredging of the Columbia River.

- **Water Resources:** Cases in this area include defending permit decisions, rules, and enforcement actions as well as prosecuting general stream adjudications. The division continues to work closely with the Governor's Office and the Department of Ecology in the development and implementation of a judicial and

## Ecology Division

legislative strategy to reform the state's system of water resource management. The division recently worked with the Solicitor General's Team to complete a report to the Legislature on the topic of Federal and Indian Reserved Water Rights. The division is also working in conjunction with the department to complete a report on Streamlining Adjudications. Further, the division is assisting the Attorney General who is leading a Water Disputes Task Force in its study of judicial and administrative alternatives for resolving water rights disputes. In the area of

litigation, which drives the majority of the division's workload in the water resources area, division attorneys are currently litigating issues of enforcement, tribal water rights, municipal water rights, the licensing of groundwater withdrawals, and a significant number of cases involving the change or transfer of existing water rights. In the state's longest running general adjudication, Acquavella, the division will continue with efforts to use mediation to significantly narrow the issues remaining to be litigated.

**"Due to the economic downturn, division work in the bankruptcy courts has increased over the past year as businesses with environmental cleanup obligations seek bankruptcy protection."**

**Water Quality:** The division's water quality practice involves a significant amount of work providing advice on permit actions, and defending challenges to Ecology's permit decisions. There are significant numbers of enforcement actions such as orders and penalties that are subject to administrative hearings and judicial review. The division is also advising the Department of Ecology regarding its efforts to address non-point

source pollution and its implementation of the Total Maximum Daily Load (TMDL) requirements of the federal Clean Water Act. Increased workload in this area will also result from advising and defending the department's decisions regarding the regulation of stormwater discharges, the adoption of new statewide water quality standards, and the renewal of a significant number of pulp and paper mills discharge permits.

**Hazardous Waste Management and Cleanup:** In this area of the division's practice, assistant attorneys general negotiate and enforce consent decrees and orders requiring cleanup of sites contaminated with hazardous substances. The division also defends Department of Ecology permit decisions and enforcement actions against facilities that generate, treat or dispose of hazardous wastes in order to prevent the creation of more contaminated sites. The division continues to look for opportunities to promote "brownfields development" through the use of innovative agreements that allow purchasers of contaminated property to

resolve liability concerns, thus freeing up the properties for development. Significant areas of work include advising and defending Ecology as it develops new regulatory approaches for handling emerging problems such as the closure of major hazardous waste treatment, storage and disposal facilities, and the widespread contamination of arsenic and lead resulting from lead smelters and the past application of lead arsenate to fruit orchards. In addition, due to the economic downturn, division work in the bankruptcy courts has increased over the past year as businesses with environmental cleanup obligations seek bankruptcy protection.

**Shorelines:** Division attorneys are involved with resolving Shoreline Management Act disputes at all levels of administrative and judicial review. In 2002 this involved extensive mediation to develop a proposal for Shoreline

Management Act guidelines as a means to resolve divisive litigation over such guidelines. The division also defended the Department of Ecology's approval of the city of Everett's update of its shoreline master program before the

# Ecology Division

- Growth Management Hearings Board. In addition, division attorneys have been involved in numerous permit case and rule challenges. Future work will focus on rule proposal and adoption and then development, review, and appeals focused on the updating of shoreline master programs across the state.
- **Spill Prevention Program:** The Olympic Pipeline Explosion and gasoline spill required work on the natural resources damages assessment and restoration, where Ecology along with other trustees has worked with the liable parties. The department issued two of the largest penalties in state history (\$7.86 million) against Olympic Pipeline and Equilon Pipeline Company for the 236,000 gallon spill and explosion that killed three people. In addition to this work, the division attorneys represent Ecology in numerous enforcement actions taken by the spill prevention program, and in development of rules governing the contingency plans for oil handling facilities in Washington.
- **Air Quality:** In this area, the division defends Department of Ecology permit decisions and enforcement actions. The department continues to actively enforce its regulations relating to agricultural burning through the issuance of enforcement orders, which are often appealed. In addition, the division is defending Ecology against a complaint by a company which claims damages related to its contract with the state to perform emissions testing. The department is currently implementing a program requiring issuance of complex, facility-wide air operating permits that continue to generate additional workload for the Ecology Division both in requests for advice as well as defenses of permit decisions.
- **Other:** Division attorneys also work in a number of other areas including the regulation of water well drillers, solid waste management, environmental review of significant projects under the state Environmental Policy Act, and oil spill prevention and cleanup. The area of hydroelectric dam regulation has been an increasing focus of the division and the work has extended beyond Washington cases to coordinating national efforts to combat efforts by the federal government to impede state authority. Similarly, the office has been a leader in a national effort by state attorneys general resisting efforts by the federal government to reduce state authority over the environmental impacts of military bases.

## Significant Cases and Issues

- **Ecology v. Campbell & Gwinn:** In a 5-4 decision, the state Supreme Court ruled for the Department of Ecology concluding that the exemption from ground water permitting in RCW 90.44.050 does not apply if the wells that a developer plans for a housing development will collectively withdraw in excess of 5,000 gallons per day.
- **Columbia River Water Right Permits:** This case involved consolidated challenges by water right applicants who complained about Ecology’s failure to issue new water rights permits for withdrawals from the Columbia River. The plaintiffs also took issue with Ecology’s plan to condition the exercise of certain new water rights on instream flows which were developed using the National Marine Fisheries

## Ecology Division

Service's 2000 Biological Opinion. After extensive litigation before the Benton County Superior Court, the state achieved

a negotiated resolution of the plaintiff's claims.

**United States and Lummi Indian Nation v. State of Washington, et. al:** In this federal court action, the United States and Lummi Nation seek a declaration as to priority and quantity of the Lummi

Nation's claimed right to groundwater on the Lummi Peninsula in Northwest Washington State. Trial is scheduled for early 2004 with discovery and motion practice ongoing.

**PUD No. 1 of Pend Oreille County v. Ecology ("Sullivan Creek"):** The state Supreme Court held that Ecology is authorized under both federal and state law to condition Section 401 Certifications with instream flow requirements that affect

the exercise of existing water rights. The court also ruled that Ecology is not authorized to consider the public interest in evaluating applications for changes of surface water rights.

**SeaTac Third Runway:** After an extensive hearing, the Pollution Control Hearings Board affirmed a Clean Water Act Section 401 Certification issued to the Port of Seattle authorizing the construction of a third runway at SeaTac Airport. Affected

citizens and communities who oppose the construction of the runway have appealed the board's decision. The Port of Seattle and the Department of Ecology have also appealed certain of the provisions added to the certification by the board.

**Envirotest:** The Department of Ecology is defending against a breach of contract suit filed by Envirotest, the former vehicle emissions testing contractor, for more than \$3 million. Envirotest argues the state owes it damages for regulatory changes

that resulted in Envirotest testing fewer vehicles. The state denies liability on several grounds including that the contract did not guarantee testing volumes and has moved for summary judgment.

**Alexander Farms v. Ecology:** A Benton County Superior Court ruled in Ecology's favor in this case regarding the applicability of the pesticide application exemption in MTCA. In trial, Ecology proved that a hop grower acted negligently and did not follow

the laws and regulations that applied to the proper handling, mixing, loading, storage, and disposal of pesticides and therefore did not qualify for the exemption. This matter is now before the Court of Appeals, Division III.

**Ecology v. Asarco:** In a 7-2 decision, the state Supreme Court ruled that Asarco's "as applied" constitutional challenge to the retroactive application of the state Model Toxics Control Act was not ripe and not justiciable. Asarco owned and operated a lead smelter and arsenic recovery facility in the city of Everett

from 1904 to 1912. In the early 1990s, Asarco was named as a "potentially liable person" under Washington's Model Toxics Control Act for widespread lead and arsenic contamination in commercial and residential areas of Northeast Everett and brought a preemptive challenge to Ecology's anticipated cleanup decision.

**Area-wide Contamination:** The division has been providing significant legal advice to Ecology in support of a stakeholder task force created by the departments

of Ecology, Health, Agriculture and Community, Trade and Economic Development to help the agencies develop a strategy for addressing the

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# Fish, Wildlife, and Parks Division

## Summary of Responsibility

The Fish, Wildlife, and Parks Division represents the Washington Department of Fish and Wildlife (WDFW) and the State Parks and Recreation Commission in all types of legal matters before state and federal courts and administrative tribunals.

In addition, the division advises the client agencies in a wide variety of civil and criminal matters, assists local prosecutors, and provides general information to the public concerning natural resource issues.

**"The division counsels and represents WDFW in a wide range of settings related to the protection and recovery of terrestrial and aquatic species that have been listed or are candidates for listing under the ESA."**

## Legal Services Provided

The division provides litigation and advice services covering a wide range of legal issues. These include fish and wildlife resource management, habitat protection, tribal issues, rule adoption, public disclosure, hydropower licenses, law enforcement, land acquisition and management, public works construction,

endangered species issues, water rights and contracts. Litigation may involve State Environmental Protection Act, Shoreline Management Act, and Growth Management Act cases, and appeals of licensing actions, hydraulic project approvals and forest practice permits.

## Numbers/Trends

The ESA has been the source of a growing workload for both client agencies and for the division. The division counsels and represents WDFW in a wide range of settings related to the protection and recovery of terrestrial and aquatic species that have been listed or are candidates for listing under the ESA. Additionally,

citizen initiatives on wildlife management and challenges to them have become increasingly frequent. Tribal issues remain prevalent. Tribal hunting issues in particular, are arising with increasing frequency. Real estate issues are expected to increase, especially for State Parks.

## Significant Cases/Issues

**United States v. Washington, subproceeding 89-3 (shellfish):** In January 1998, the Ninth Circuit Court of Appeals issued a ruling affirming the trial court's decision that tribes may take up to half of the shellfish from most

beaches (including shellfish farms and private lands) and half of all deep water shellfish fisheries (crab, shrimp, and geoduck). Since the initial decisions became final, the division has assisted WDFW in developing and negotiating

## Fish, Wildlife, and Parks Division

**"The division is advising WDFW regarding the complex and challenging legal issues that arise during the negotiations, including those involving the Endangered Species Act (ESA) and its relation to federal Indian law."**

- management and harvest agreements. The division is currently representing WDFW in settlement negotiations regarding implementation of the court's orders.
- **United States v. Washington, subproceeding 01-1 (culverts):** In January 2001, 21 Indian Tribes and the United States sued the state, alleging it violates the Tribes' treaty "right of taking fish" by owning culverts that block fish passage, to the extent that such culverts impair the Tribes' ability to earn a "moderate living" from fishing. The state takes the position that its ongoing efforts to identify and repair defective culverts satisfy any treaty-imposed obligation to provide fish passage. The case has broad implications for land use and resource management in the Pacific Northwest. Since May 2002, the parties have been engaged in settlement negotiations.
- **United States v. Oregon:** Five Columbia River basin Treaty Tribes, three Columbia River Basin states, and the federal government are negotiating a new fish management plan governing fisheries, as well as fish production, in the main stem of the Columbia River. The division is advising WDFW regarding the complex and challenging legal issues that arise during the negotiations, including those involving the Endangered Species Act (ESA) and its relation to federal Indian law.
- **Initiatives 655 and 713:** Statewide hunting of cougars, bobcat, black bear, or lynx with hounds was eliminated by Initiative 655 in 1996. The division recently defended I-655 against a challenge alleging that it violates the Public Trust Doctrine. Thurston County Superior Court Judge Paula Casey granted the state's summary judgment motion and dismissed the lawsuit on November 15, 2002. In another Thurston County suit, a coalition of trappers and sportsmen challenged the constitutionality of the I-713, which bans the use of body-gripping traps and two kinds of poisons. After hearing cross motions for summary judgment, Judge Richard Strophy upheld the constitutionality of I-713. The Washington Supreme Court granted direct review of Judge Strophy's decision. The court heard oral argument on November 19, 2002. The decision is pending.
- **Tribal Hunting:** In 2001, the division assisted WDFW in negotiating an unprecedented agreement with the four Medicine Creek Treaty Tribes regarding the designation of a geographical line on which the state, Tribes, and county prosecutors could rely in enforcing state and tribal hunting regulations. WDFW subsequently adopted the enforcement line by rule. In 2002, the division successfully defended a challenge to the rule by the Cowlitz Tribe in Thurston County Superior Court. The division continues to provide WDFW with advice regarding the implementation of the 1999 supreme court decision in *State v. Buchanan*.
- **Hydropower Issues:** The division represents WDFW in proceedings before the Federal Energy Regulatory Commission (FERC) and federal courts, concerning the licensing and re-licensing of hydropower dams in the state. These are lengthy and complex proceedings, involving high-stakes contests between the economics of electrical power generation and protection of fish and other wildlife resources jeopardized by the presence and operation of the facilities. The following major proceedings are representative of the work done by the division:
  - **Condit --** This hydroelectric project is located on the White Salmon River. The parties to the relicensing proceed-

## Fish, Wildlife, and Parks Division

ing, including the dam owner, federal and state agencies, the Yakama Indian Nation, and a coalition of environmental groups, had joined in a settlement agreement providing for removal of the dam. After submission to FERC, further environmental review was initiated. The licensee has now begun permitting and approval processes for dam removal under the Clean Water Act and the Endangered Species Act.

- **Cowlitz** -- The division assisted WDFW in reaching a settlement agreement for licensing the hydroelectric facility. The agreement involves state and federal

agencies, the Yakama Indian Nation, and includes several environmental groups. FERC accepted the settlement agreement and issued a license. A Clean Water Act certification necessary for the license was appealed and the license was suspended pending the outcome of the appeal.

- **Box Canyon** -- FERC has recently rejected one of WDFW's recommended license terms and conditions for the protection of fish and wildlife. WDFW is considering its administrative options.

**Cama Beach State Park:** State Parks was engaged in extensive litigation with the Tulalip Tribes over the renovation and development of Cama Beach State Park, a 1930s era fishing resort, and also the site of extensive archaeology. The Tribe challenged DNR's approval of Parks' Forest Practices Application at the Forest Practices Appeals Board, and the issuance of the Shoreline Substantial Development/

Conditional Use Permit at the Shoreline Hearings Board. Parks and the Tribe ultimately settled all litigation. The Tribe dismissed its pending administrative challenges, and agreed to construct and operate, at its own expense, a longhouse on state park land to be open to the public for cultural native arts programs, providing a true win-win situation.

**Park Closures:** Due to a \$2.6 million budget reduction for the 2001-2003 biennium, State Parks was faced with the prospect of closing 13 parks throughout the state. As a result, this office assisted State Parks in lease cancellations and in negotiations with federal agencies and PUDs, on land owned by those entities

but managed by the department. Through negotiations, whereby the landowners agreed to contribute to operating costs, and through the imposition of a parking fee on select Columbia River parks, State Parks was able to keep all but four parks open to the public.

# Natural Resources Division

## ● Summary of Responsibility

- The Natural Resources Division represents the Commissioner of Public Lands, Department of Natural Resources (DNR), Board of Natural Resources, Forest Practices Board, Board of Geographic Names, and other related committees.

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## ● Legal Services Provided

- The division provides a broad spectrum of client advice, dispute resolution, and litigation services. DNR manages three million acres of state uplands, generating as much as \$300 million a year for trust beneficiaries, and also manages more than two million acres of aquatic lands.
- DNR also exercises extensive regulatory, environmental and fire protection responsibilities on 11.8 million acres of state and private forest lands, and administers several programs designed to purchase property interests to protect riparian areas.

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## ● Numbers/Trends

The division's workload has increased in several areas:

- **Proprietary Forest Management Issues:** DNR is in the process of making a number of decisions about management of forest lands owned by the state and held in trust. Interest groups have become increasingly aware of and involved in DNR's forest land management activities. Given the current state budget crisis, the trust beneficiaries who receive revenue from state timber sales, such as universities, school districts, and counties, are also quite interested in DNR's forest land management decisions. The consequence has been an increased demand for client advice in this area as well as more litigation. The division is currently defending a programmatic challenge to the timber sales program in superior court. In addition to defending an increasing number of legal challenges to timber sale operations on state forest lands, the division is also assisting DNR with issues such as generation of a sustained yield calculation, examination of the state's substitution rules that implement the federal ban on timber exports, and implementation of the Endangered Species Act Habitat Conservation Plan for state lands.
- **Proprietary Transactions:** DNR's transactions include monthly timber sales as well as purchases, sales, exchanges and leases of forest lands, commercial properties, agricultural lands, and aquatic lands. This year division attorneys assisted DNR with approximately 280 transactions. These transactions often raise issues involving the Forest Practices Act, State Environmental Policy Act (SEPA), Growth Management Act (GMA), hazardous waste

## Natural Resources Division

laws, water rights and the Endangered Species Act (ESA). Legal challenges in this area are increasing slightly. DNR is attempting to expand its agricultural

land holdings. Accordingly, the division is assisting with an increased number of complex water right issues as well as SEPA issues.

- **Forest Practices:** The Forest Practices Board adopted permanent Forest and Fish Rules effective July 1, 2001. These rules implement the 1999 Salmon Recovery Act and the Forest and Fish Report. The forest and fish negotiations were initiated in 1996 in response to concern over declining populations of salmon. The forest and fish rules address a number of issues, such as water typing, riparian management zones, unstable slopes, forest roads, wetlands, watershed analysis, and pesticides.

The number of administrative appeals of DNR's regulatory decisions implementing these rules has remained fairly constant over the last year. However, the cases are becoming more complex and often involve issues of first impression concerning interpretation of the new rules. The division is assisting the Forest Practices Board as it considers additional topics of potential rulemaking, including cultural resources, wildlife, watershed analysis and forest health issues.

- **Recreation and Access to State Land:** As private landowners continue to close their lands to the public, DNR faces increasing pressure to keep state lands available to the public for recreation. Division attorneys have responded to a number of requests for advice and in-

creasing litigation surrounding issues related to public access. Issues include: the ability to regulate the shooting of firearms, the regulation of off road vehicle usage, DNR enforcement authority generally, and issues concerning the recreational immunity statute.

## Significant Cases and Their Impact

**SDS Company v. DNR:** In this regulatory takings case, DNR imposed conditions on a forest practices application submitted by SDS. The conditions were designed to protect a pair of northern spotted owls. A jury found that DNR had "taken" the property, resulting in a \$3 million judgment in SDS's favor. This case raises at least two significant issues: (1) whether the court should consider all of a landowner's related timber holdings, and not just the

regulated parcel, when evaluating the economic impact of regulatory activity; and (2) whether a landowner must investigate state and federal landscape planning alternatives that might provide harvest opportunities prior to bringing a takings suit. In a settlement, contingent on a legislative appropriation, DNR agreed to pay \$2.7 million in exchange for title to the 232 acres at issue.

**Northwest Ecosystem Alliance v. FPB:** This case involves a major challenge to the forest practices rules. The superior court dismissed the case, concluding that claims relating to the agency's alleged failure to update or amend rules needed to be raised with the Forest Practices Board before seeking judicial review. The court

of appeals reversed in part, holding that a party need not go to an agency first when the party alleges that the agency has failed to perform a duty required by law. The Forest Practices Board, DNR, and the Department of Ecology sought state Supreme Court review on whether a party must ask the agency to change its

**"As private landowners continue to close their lands to the public, DNR faces increasing pressure to keep state lands available to the public for recreation. Division attorneys have responded to a number of requests for advice and increasing litigation surrounding issues related to public access."**

## Natural Resources Division

**"Several environmental groups have filed a programmatic challenge to DNR's timber sales program. Plaintiffs allege that DNR is failing to adequately address the cumulative impacts of timber harvesting on state land under SEPA."**

- rules before seeking judicial review of an alleged failure to adopt or amend rules.

The parties argued the case in September and are awaiting a decision.

### **Washington Environmental Council v. National Marine Fisheries Service:**

- The Washington Environmental Council and other environmental organizations filed a lawsuit in federal district court challenging a rule adopted by the National Marine Fisheries Service (NMFS) under section 4(d) of the Federal Endangered Species Act. The rule allowed the state to subsequently submit forest practices rules adopted pursuant to a negotiated forest and fish process to NMFS for coverage under

the 4(d) rule. Coverage under the rule would provide protection from liability under the ESA for the otherwise unlawful "take" of a threatened species. Division attorneys filed an amicus curiae brief on behalf of the state in support of NMFS' rule. The federal district court dismissed the case, primarily on ripeness grounds. This was an important first milestone in what is likely to be ongoing litigation over forestry and ESA issues.

### **State Owned Forests & Washington Environmental Council v. Sutherland:**

- Several environmental groups have filed a programmatic challenge to DNR's timber sales program. Plaintiffs allege that DNR is failing to adequately address the cumulative impacts of timber harvesting on state land under SEPA. They also challenge on similar

grounds DNR's extension for three years of an existing forest resource plan that contains policies for the management of state forest land. A large number of school districts and counties have intervened as defendants. This case is scheduled for trial in December 2003, in King County Superior Court.

### **Pacific Sound Resources & Port of Seattle v. Burlington Northern Santa Fe Railway Corp., et al.:**

- Pacific Sound Resources and the Port of Seattle recently joined DNR and the state as defendants in a contribution action under the Model Toxics Control Act (MTCA). Plaintiffs seek to recover their costs of cleaning up a Superfund site in King County (allegedly

between \$20 and \$40 million) and a declaration that defendants are liable for future costs. The state owns some of the land within the site, and DNR has leased that land. This case involves issues of first impression concerning DNR and the State's liability under MTCA. The case is scheduled for trial in 2004.

### **Thea Foss Waterway Superfund Site:**

- DNR, with the assistance of the division, completed negotiations on its equitable contribution to the Thea Foss Waterway cleanup. The settlement was reached after years of negotiation with EPA and other

parties, as well as an EPA-sponsored mediation process. Under the settlement, DNR will pay approximately \$3.7 million of a \$60 million cleanup and will provide certain in-kind services.

## **Major Issues/Events**

- Federal Assurances:** As part of the forest and fish process, the state is seeking from NMFS and the U.S. Fish and Wildlife Service an ESA section 10 incidental take

statement and/or coverage under NMFS' 4(d) rule for activities conducted under the forest and fish rules adopted by the state Forest Practices Board. The state is also

## Natural Resources Division

seeking assurances from EPA concerning the ability of the state rules to meet certain federal Clean Water Act requirements. Division attorneys have provided and

will continue to provide significant legal advice to DNR and the Governor's Office during this process.

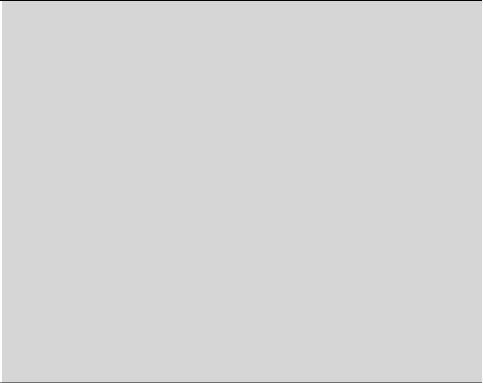
**Hazardous Waste Cleanup:** The state of Washington owns aquatic lands (submerged lands, tidelands, bedlands) in Puget Sound, some of which have become polluted and contaminated. Under federal and state hazardous waste laws, owners and managers of lands which have become contaminated may be strictly liable for the costs of investigating and cleaning

up the contamination. The state may be potentially liable for substantial sums even if it was not the polluter. Over the last year division attorneys have assisted DNR in making substantial progress in negotiations regarding several federal Superfund sites, including the Thea Foss site discussed above.

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# Protecting Public Funds

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# Revenue, Bankruptcy & Collections Division

## Revenue Unit

### Summary of Responsibility

The Revenue Unit provides legal services to the Department of Revenue (DOR), which administers and collects the state's major excise taxes. The division also handles legal issues relating to the administration of the state's property

tax system, including the assessment of business property owned by public utilities and the administration of the state's unclaimed property law and estate tax.

**"There currently are approximately 160 cases addressing a wide variety of predominantly excise tax claims. Many of these claims are of industry-wide significance."**

### Legal Services Provided

The unit's principal legal activity involves the defense of the DOR against excise tax refund claims in the state courts. Utility property tax litigation, as a future part of

the division's caseload, may be affected by legislation providing tax exemptions for businesses owning intangible assets.

### Numbers/Trends

The unit historically receives 50 to 70 new cases in litigation annually. The unit was in the middle of the historic range in 2002. There currently are approximately 160 cases addressing a wide variety of

predominantly excise tax claims. Many of these claims are of industry-wide significance. Additionally, there are approximately 45 cases related to out-of-state manufacturer issues.

### Significant Pending Cases and Their Impact

**Out-of-State Manufacturers:** Currently before the courts are significant refund claims brought by out-of-state manufacturers and product suppliers to Washington manufacturers in which these

taxpayers contend that the sales of such products, in fact, occur outside the state and thus are exempt from the business and occupation tax.

**Tobacco Products Taxes:** The incorporation of a marketing subsidiary by a manufacturer of tobacco products (other than cigarettes) has led to a major challenge to the tax base on which the

state's "other tobacco products" tax is calculated. The outcome of this ongoing litigation will affect significant refund claims brought by tobacco distributors.

# Revenue, Bankruptcy & Collections Division

**"The unit plays an important role in the implementation of the historic tobacco litigation settlement agreement."**

- **Estate Tax:** A class action lawsuit challenges the administration of Washington's estate tax. The class plaintiffs assert that Washington's estate tax is "coupled" with the federal estate tax. They contend that the significant changes to the federal estate tax Congress enacted in 2001 necessarily apply with respect to Washington's estate tax so as to reduce or eliminate the amount of estate taxes that must be paid to the state under the credit provisions of the federal estate tax.

## Major Issues/Events

### Court Rulings:

- **Department of Revenue v. Security Pacific Bank of Washington National Association:** In early 2002, the court of appeals affirmed a Board of Tax Appeals' decision, finding that the taxpayer bank was entitled to a deduction under state law for the interest it earned on advances that it made to mortgage companies. The mortgage companies used the advances to fund loans to third party borrowers, which were primarily secured by first lien deeds of trust on nontransient residential properties.

- **Benton County Public Utilities District No. 1 v. Department of Revenue:** In an unpublished decision, the court of appeals affirmed a summary judgment in favor of DOR. The court held that RCW 82.04.417 (repealed in 1997) gave an exemption for income received by a public utility, not a deduction for a utility's expenses. Consequently, a public utility's payments to another entity (that represented a capital cost to that entity) would not qualify for the exemption. The 21 public utility districts in this claim sought refunds in excess of \$20 million.

- **Pilcher v. Department of Revenue:** The court of appeals affirmed the trial court's judgment in favor of DOR in an excise tax refund action filed by an emergency room doctor seeking "pass through" treatment under WAC 458-20-111. The taxpayer sought to deduct, for business and occupation tax purposes, his labor expenses (i.e., the amounts he paid to several physician subcontractors for their services). The court held that the payments did not constitute true "pass through" payments and, therefore, they were subject to the business and occupation tax.

- **Other Events:** The unit plays an important role in the implementation of the historic tobacco litigation settlement agreement. The unit, working with the DOR, enforces the "escrow" statute adopted by the Legislature. This statute applies to cigarette manufacturers that sell tobacco products within the state but have not joined the settlement agreement. The amount must be put into escrow, is based on the sales of product each year and provides a source of accountability for compliance with state law. Enforcement of this statute also insulates the settlement payments received by the state from being reduced based on what is referred to as the non-participating manufacturer's (NPM) adjustment. This adjustment applies if there is an increase in the NPMs' market share resulting from the implementation of the settlement agreement. If a state however diligently enforces an escrow statute, it will be protected from the NPM adjustment. The unit has been aggressively monitoring and enforcing the statute including initiating six enforcement actions in 2001.

## Revenue, Bankruptcy & Collections Division

# Bankruptcy and Collections Unit

## Summary of Responsibility

The Bankruptcy and Collections Unit (BCU) encourages voluntary compliance with the state's tax laws by supporting the efforts of state agencies to aggressively pursue money owed to the state. Most of the money is owed for delinquent sales and business and occupation taxes, industrial insurance premiums, and unemployment fund contributions.

The BCU gives priority to representing the DOR, L&I, and Employment Security in bankruptcy cases. Assistance has also

been provided to other agencies including Agriculture, CTED, Corrections, Financial Institutions, Ecology, Health, Natural Resources, DSHS, State Patrol, Transportation, University of Washington, Washington State University, WUTC, and the Consumer Protection Division.

Because of the business expertise of attorneys in the BCU, the unit also serves as general counsel to the Washington State Convention & Trade Center.

**"The unit's attorneys provide legal services at all stages of a bankruptcy case."**

## Legal Services Provided

The vast majority of the BCU's work consists of handling bankruptcy litigation in cases under chapter 11 ("corporate reorganizations") and chapter 13 (cases involving regular income from small businesses or jobs) of the federal bankruptcy code. The unit's attorneys provide legal services at all stages of a bankruptcy case. A typical case would include appearing early on behalf of the agency, obtaining all financial information necessary to analyze the agency's claims, asserting secured or trust fund status, if appropriate, and defending any challenges to agencies' claims. The BCU's attorneys also review proposed bankruptcy plans to ensure proper treatment of agency claims and to enforce payment when taxes or payments under court-approved plans are delinquent.

Although top priority is given to bankruptcy cases, the BCU handles a significant number of non-bankruptcy

collection cases. These include civil proceedings to recover monies, stopping delinquent taxpayers from doing business, and collection actions against the bonds of contractors who are delinquent in tax payments. The unit also devotes substantial resources to providing training and manuals for tax agency personnel who handle bankruptcy and collections claims.

As general counsel for the state Convention Center, the BCU's work has recently focused on the Convention Center's current expansion project. This work has included negotiating and drafting contracts for expansion work, working on the acquisition of property for expansion and the relocation of tenants on the expansion site to other locations, assisting with the financing of the expansion, and working on issues relating to co-developers on the expansion project.

# Revenue, Bankruptcy & Collections Division

"The unit currently has 661 active cases with a total of \$36.5 million in agency claims."

## Numbers/Trends

A total of 10,735 bankruptcy and collections cases have been handled on behalf of the state since the BCU was created in 1993. The BCU has collected more than \$79.7 million, including \$47.6 million in payments made, \$11.2 million in claims successfully defended, and \$20.7 million in future payments to be made to the state under court orders. The unit currently has 661 active cases with a total of \$36.5 million in agency claims.

## Significant Cases and Their Impact

**GST/Time Warner Telecom:** The Delaware bankruptcy court upheld the state's objection to confirmation of the debtor's plan of reorganization, ruling that the §1146(c) exemption for stamp tax does not apply to Washington's use tax. At issue is DOR's \$5 million assessment of taxes resulting from the sale of assets from GST to Time Warner Telecom. The case is on appeal to the Third Circuit.

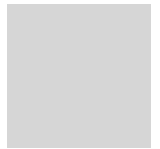
**U.S. Health & Fitness, Inc.:** After confirmation of his plan of reorganization, the debtor had problems making the plan payments and paying post-confirmation taxes. Rather than attempt to make payments over six years and to forestall collection action, the debtor agreed to sell his business and pay 78 percent of the pre-petition debt and all of the post-petition debt. The debtor paid a total of \$394,158.86 to the three tax agencies.

**Roberto Clemente, Jr.:** In an interpleader action in the U.S. District Court, the city of Puyallup deposited \$133,780.95 with the court (proceeds from an arbitration award to Roberto Clemente for termination by the city without just cause). The IRS, DOR, DSHS and several private parties all filed claims against the funds. After a series of complex negotiations the parties settled and DOR received approximately \$60,000.

**W.R. Grace v. Dept. of Revenue:** W.R. Grace filed its injunction action in 1994. After a Supreme Court decision in favor of DOR, an unsuccessful appeal to the U. S. Supreme Court, a remand to the superior court, and an April 2001 Delaware bankruptcy filing by W.R. Grace, a settlement of all remaining issues was negotiated. After obtaining bankruptcy court approval of the settlement, DOR received \$1,470,414.20 in taxes owed for the years 1980 through 1990.

**Paul S. Jones:** The debtor filed a Chapter 7 bankruptcy in Florida seeking to discharge more than \$62,000 in disability payments fraudulently obtained from the state and directed the State Patrol to recoup the money from his current benefits and declined to object to the debt's discharge. The debtor's subsequent suit in Florida to stop the recoupment was unsuccessful.

# Torts Division



## Summary of Responsibilities

The Torts Division defends tort claims and lawsuits against all state agencies. The majority of cases are based on actions brought under theories of liability for state actions such as highway design, release of inmates, injuries on state property, medical malpractice, employment, child care and custody, auto accidents, false arrests and unreasonable force.

Tort attorneys also provide legal and risk management advice to state agencies on tort claims. In addition, the division provides advice and assistance to other divisions of the office on matters of trial practice, case evaluations and investigations and trial team assistance in specialized litigation efforts, such as shellfish or regulatory takings.

**"The Torts Division prevails at trial in more than three out of four cases tried."**

## Legal Services Provided

The primary legal service provided by the Torts Division is the resolution of damage claims against state agencies and employees. Many cases are resolved through successful pretrial motions, saving the state significant resources in research, discovery and investigations. The remaining cases are evaluated for

settlement after pre-trial discovery and investigation. If possible, cases are settled through direct negotiation, or mediated negotiation. Cases that cannot be settled, or are inappropriate for settlement due to lack of liability, are tried before juries. The Torts Division also handles all appeals resulting from those cases.

## Numbers/Trends

The Torts Division is currently handling approximately 750 cases. In FY 2001, the complexity of cases rose dramatically. In 1991 only 22 complex lawsuits were filed. In 2002 there were over 125 complex cases filed against state agencies. Investigators handle approximately 250 pre-lawsuit claims for damages each year. The division resolved 51 percent of the cases with no payout of state funds in FY 2002. Forty percent are settled and the other five percent are tried before juries or arbitrated.

The Torts Division prevails at trial in more than three out of four cases tried. However, verdicts in cases lost by the

state have increased markedly due to nature of the injuries for which the state is now held liable. In FY 2002 the division tried 29 cases to verdict. There were 17 defense verdicts, 3 hung juries and one mistrial. The remaining verdicts totaled \$1.5 million. Two of those cases are on appeal.

The division has a newly created Torts Appellate Program which handled 48 cases to resolution with an 86 percent win/loss ratio. Over the last five years, the division has averaged a win/loss ratio on appeal of 90 percent. The team is made up of a supervising attorney, two assistant attorneys general, three paralegals and

## Torts Division

**"Experienced torts attorneys not only attempt to limit the amount of tax dollars spent in tort payouts, but they also provide advice, training and other cost saving assistance to agencies in the areas of risk prevention, planning and management."**

- professional staff. The team not only handles significant appeals but also consults on significant motions and jury instructions.

- The division has seen the large increases in employment litigation reflected in 25 percent of the division's workload in tort employment lawsuits. Litigation against DSHS social workers and social service programs, particularly those dealing with children is another increasing caseload. These are areas of relatively new state liability, as recognized by the courts, and it is expected that litigation in these areas will continue to grow in volume, complexity and potential dollar exposure to the state. In the past two years, the court of appeals has issued four more decisions

which will increase DSHS liability for child protective activities.

In recent years, average total payouts to resolve tort cases generally ranged from \$5 million to \$30 million per year. In 2001 the amount took a sharp increase up to over \$80 million dollars as a result of a few large verdicts and payouts. In fiscal year 2002, the amount of tort payouts decreased back to previous levels at \$31 million.

Experienced torts attorneys not only attempt to limit the amount of tax dollars spent in tort payouts, but they also provide advice, training and other cost saving assistance to agencies in the areas of risk prevention, planning and management.

### ● Significant Cases and Their Impact

- **Wenatchee "Sex-Ring" Cases:** Local authorities in the Wenatchee area, with assistance from DSHS, investigated allegations of extensive sexual abuse of children by a large group of acquainted individuals. Local prosecutors ultimately charged a significant number of them and most were convicted or agreed to a plea bargain. Some were acquitted after trial. The acquitted persons and several who were convicted or plea-bargained sued the local prosecutor, local police and DSHS employees, claiming they were negligently investigated, falsely arrested, or maliciously prosecuted. DSHS was

also being sued by several employees who were terminated for poor performance in connection with specific earlier complaints concerning some of the abused children or specific wrongdoing in connection with the "sex-ring" investigations. In a major trial victory, the state and local authorities received a defense verdict in the major lawsuit by individuals who had been acquitted of criminal charges. However, an appeal of this result is likely and other cases are pending. In one of the other cases, a different jury awarded a former Wenatchee office employee more than \$1.5 million.

### ● Major Issues/Events

- **Wrongful Adoption Cases:** Three years ago there were approximately 15 "wrongful adoption" cases pending against DSHS and its caseworkers. The claim was that caseworkers were negligent in not fully disclosing psychological or emotional problems of children before adoption. The parents generally sought

damages for their emotional distress in raising the children and large damages for care and treatment of adopted children. Many of the lawsuits alleged that the children had Fetal Alcohol Syndrome. The state has settled some of these cases and some have been dismissed. The state won two others at trial, one of which was

## Torts Division

appealed to the state Supreme Court. The court affirmed the defense verdict in favor of the state. However, the court, unlike courts in most other states, did generally

approve the legal basis for filing this kind of lawsuit against the state and adoption agencies. More of these lawsuits are now being filed and some are going to trial.

**Dependency Cases:** State law provides that DSHS can obtain a court order allowing temporary foster care for children who are suspected of being victims of abuse or neglect. DSHS, with legal assistance from this office, handles thousands of these dependency cases every year. In some cases, the courts ultimately decide to remove children from their parents permanently or for extended periods of time. However, in many cases children are returned to their parents after investigation or professional examination reveals that abuse likely did not occur. In the past it has always been thought that

the state had no liability for obtaining temporary court orders to protect children. Recently, however, the courts have ruled that parents can sue and argue that the state “negligently investigated” the allegations of abuse or neglect which lead to the court order for temporary foster care.

Juries have been awarding hundreds of thousands of dollars in these cases. This is a major legal development because there are hundreds of cases every year in which the state might now be sued for placing children in protective foster care.

**Early Resolution Program:** The Torts Division has initiated an early resolution program. The goal of the program is to try to achieve savings by early negotiation of lawsuits and claims arising from incidents for which the state is likely to be held liable

if the matter goes to court. If the program is successful some savings in legal defense costs should be possible and some cases might also have lower settlement costs because the plaintiff or claimant has incurred lower legal costs.

**“Parole” Liability Cases:** In 1992, the state Supreme Court held that the Department of Corrections could be liable for crimes committed by released offenders who were under state post-release “supervision.” This has produced a huge increase in payout. In 1997, there was a large (\$6.5 million) verdict against the state in one of these cases and in 1998 the state Supreme Court reaffirmed its decision allowing this liability and extended the liability to local government “probation” supervision. As a result of these developments there has been a large

increase in lawsuits against the state by victims of crimes by released offenders under state supervision. The state now has almost three dozen lawsuits and claims pending against it for murder, rape, and other serious crimes by released offenders. Many of these suits represent multi-million dollar loss exposures for the state. Two of these lawsuits lead to verdicts of \$15 million and \$23 million this year and both are on appeal. One of the verdicts, Couch, has been overturned by the court of appeals and is on petition to the Washington State Supreme Court.

**"The Torts Division has initiated an early resolution program. The goal of the program is to try to achieve savings by early negotiation of lawsuits and claims arising from incidents for which the state is likely to be held liable if the matter goes to court."**

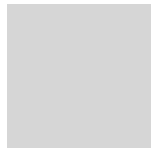
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# **Strengthening Washington's Education System**

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# Education Division



## Summary of Responsibility

The Education Division provides a full range of legal services to more than 50 education-related clients, including: three regional universities; The Evergreen State College; 28 community colleges; five technical colleges; and other education-related boards, such as the Higher Education Coordinating Board, the State Board for Community and Technical

Colleges, the Council of Presidents and the Center for Information Services. In addition, the division serves the Office of the Superintendent of Public Instruction, nine area-wide educational service districts, the State Board of Education, the Academic Achievement and Accountability Commission, and the Professional Educator Standards Board.

**"Attorneys devote about 30 percent or more of their time to hearings and litigation involving administrative hearings, arbitrations, and cases before the U.S. District Court, Superior Court, Court of Appeals, and the state Supreme Court."**

## Legal Services Provided

The workload of the division is extremely diverse. On any given day, division attorneys advise on matters as varied as constitutional rights, labor/management disputes, employee rights, student rights and responsibilities, discrimination and sexual harassment, public contracting, intellectual property, and general public sector business issues. Attorneys also represent their education clients at hearings on a variety of education-related matters, including prosecution of teacher

misconduct, consumer complaints against private vocational schools, labor arbitrations, and employee and student misconduct hearings. In serving the Higher Education Coordinating Board, the State Board for Community and Technical Colleges, and the Superintendent of Public Instruction, the division handles a wide variety of legal issues associated with both the K-12 and higher education systems, taking into account many federal as well as state laws.

## Numbers/Trends

The workload of the division has substantially increased during the current biennium. Enrollment at the regional universities, The Evergreen State College, and the community and technical colleges has increased by approximately 40,000 students. Attorneys devote about 30

percent or more of their time to hearings and litigation involving administrative hearings, arbitrations, and cases before the U.S. District Court, Superior Court, Court of Appeals, and the state Supreme Court.

## Significant Cases and Their Impact

**Part-Time Community College Faculty Class Actions:** The division has defended three class actions brought by

community and technical college part-time faculty relating to their pay and health care benefits. In *Clawson, et al.*,

# Education Division

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**"Because client agencies are dealing with reduced budgets, the division's workload has increased to assist them to cope with budget-related issues."**

- *v. Grays Harbor College District, et al.*, the Washington Supreme Court recently upheld dismissal of plaintiffs' claims because they were paid as salaried, professional employees, not as hourly employees. A related case, *Clawson, et al., v. State Board for Community and Technical Colleges* is pending at the court of appeals. The superior court dismissed similar claims on the basis of the State Board was neither an employer nor a joint employer with individual college districts. Finally, in *Mader, et al., v. Health Care Authority and the State Board for Community and Technical Colleges*, the court of appeals held that part-time faculty not teaching in summer quarter were not eligible for health care benefits for that time off. That case was appealed to and argued before the Washington Supreme Court where it is pending.
- .....  
● **Education of Incarcerated Inmates:** Last year, the division successfully defended in *Tunstall v. Bergeson* the Legislature's policy decision to offer a high school diploma program to inmates incarcerated in adult correctional facilities up to age 18, but not to those age 18-21 who are instead offered a GED program. A second class action, *Blakeley, et al. v. Bergeson, et al.*, challenged the operation of the program and, it too, was successfully defended.
- .....  
● **Church and State:** *Davey v. Locke* involves the issue whether a state law barring financial aid to students who pursue degrees in theology violates the First Amendment to the U.S. Constitution, which guarantees the free exercise of religion. The state contends that the Constitution does not require it to provide public money to enable citizens to exercise constitutional rights. A provision in the state constitution prohibits the use of public money for any "religious worship, exercise or instruction." In a 2-1 decision announced in July 2002, a three-judge panel of the 9th Circuit ruled that the rights of a student majoring in business and pastoral ministries were violated because state financial aid was not offered to him. The full 9th Circuit denied review and the state is seeking review by the United States Supreme Court.

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## ● Major Issues/Events

- Because client agencies are dealing with reduced budgets, the division's workload has increased to assist them to cope with budget-related issues. It, therefore, has become even more important for the division to work more efficiently.
- Regionalization of services has allowed clients easier physical access to their attorneys which results in many matters being resolved before they involve litigation. It also requires close coordination among the attorneys in order to maintain consistent advice.
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# University of Washington Division

## Summary of Responsibility

The University of Washington Division provides legal services to the University of Washington in Seattle, with campuses in Bothell and Tacoma. The university currently has over 39,000 enrolled students. It is one of the largest employers

in King County, with about 22,000 staff and 6,500 teaching and research faculty. The university operates two hospitals, University of Washington Medical Center and Harborview Medical Center.

**"There are 69 active lawsuits and 30 active administrative cases involving the university and its affiliated hospitals and officials."**

## Legal Services Provided

The university has all the legal issues of a large state agency, many of the legal issues of a large corporation, and many legal issues unique to higher education. Accordingly, the division must provide a broad spectrum of legal advice and representation, including employment law, labor relations, student affairs, real estate, land use, environmental, intercollegiate athletics, public finance and bonding,

contracts, intellectual property, tax, employee benefits, constitutional law, gifts and trusts, and health care law. In addition, the division coordinates with assistant attorneys general representing the other colleges and universities in the state. The division also works with attorneys from the Torts Division and with special assistant attorneys general handling specialized cases.

## Numbers/Trends

There are 69 active lawsuits and 30 active administrative cases involving the university and its affiliated hospitals and officials. About half of the lawsuits are medical malpractice cases. The remaining cases involve disputes on construction projects, claims of statutory violations, personal injuries, and employment issues.

The following trends have increased demand for legal advice and representation:

- The University of Washington's medical centers, like all other health care providers, are heavily regulated and closely monitored by federal and state agencies concerning Medicare and Medicaid bill-

ing, patient privacy, research practices, and other subjects. Both the medical centers and the division are devoting greatly increased resources to ensuring compliance and responding to regulatory inquiries.

- Increased enrollment and federally-funded research continues to create pressure for growth -- particularly at the university's main Seattle campus. This, in turn, creates challenges in dealing with the neighborhoods surrounding the campus and complicates relationships with agencies planning for transportation projects, such as Sound Transit and the state Department of Transportation. It also triggers interest in development of other

# University of Washington Division

**"Enhanced collective bargaining rights for large segments of university employees have recently been added to the already complex web of federal, state, and local laws governing employment."**

areas, such as South Lake Union. The division has worked closely with the university in negotiations with community groups, in seeking approval of the campus Master Plan, in drafting contracts with other governments and businesses, and in siting and building off-campus facilities.

- Enhanced collective bargaining rights for large segments of university employees have recently been added to the already complex web of federal, state, and local laws governing employment.

Statutes and regulations concerning harassment, retaliation, and other forms of discrimination continue to grow and require legal counseling.

- The university's leadership role in scientific and technical research, computing and communications development, and other high technology has significantly increased requests for advice on intellectual property issues. These include copyright, licensing of technology, and access to computer-based information.

## Significant Cases and Legal Issues

**Labor Relations:** The 2002 session of the state Legislature authorized teaching assistants to engage in collective bargaining. The University of Washington is currently in hearings before the Public Employment Relations Commission (PERC) to determine which student appointments are eligible to be in this bargaining unit. That decision will then set the stage for allowing the employees

to select a union if they wish to. There is also new legislation authorizing faculty to unionize and collectively bargain. No union has currently been formed, but there are early signs that some employees are interested. Additionally, the university will be bargaining separately under the new legislation for state classified staff wage bargaining.

**Technology and Intellectual Property:** The university continues to gain financially by selling licenses to outside companies to use technology and intellectual property developed through the university's research activities. Recently, university software has emerged as a substantial basis for license royalties. Also, the university is exploring opportunities for using the Internet as an additional means

of providing educational services. With the expansion of the university's licensing and "distance learning" services, the division has seen a tremendous growth in the legal issues regarding interpretation and enforcement of licenses, constitutional questions including First Amendment and privacy concerns, and patent, trademark, and copyright law.

**Medical Center Investigation:** The federal government is continuing its criminal investigation into Medicare billing practices in some departments of

the Academic Medical Center. In 2003, the government is expected to shift its focus to civil proceedings to recover any overpayments.

**Presidential Search:** Following the November 15, 2002, resignation of President Richard McCormick, a search committee was formed to find and hire a new university president. The university

has called on this office to ensure the search committee and the Board of Regents have been adequately informed about the intricacies of the Open Public Meetings Act.

# Washington State University Division

## Summary of Responsibility

The Washington State University Division provides legal services to the state's land grant university from the main campus in Pullman. The division's five attorneys, with support from attorneys in other divisions in specialized areas such as employment and construction law, provide

legal services to the main campus, the three branch campuses (in Spokane, the Tri-Cities, and Vancouver), agricultural research and extension operations statewide, and extension field offices in every county.

**"Division workload continues to grow as the university continues to grow and expand its branch campus programs and its research efforts."**

## Legal Services Provided

Division attorneys provide advice on a host of legal issues, many of which are unique to an academic environment. Attorneys frequently provide advice on issues relating to: the university's research efforts, including its research agreements with the federal government and/or private sponsors, faculty research, and faculty ownership and use of intellectual property; the university's statewide Cooperative Extension Program (including 4-H programs); athletics and NCAA compliance; various student

rights and programs; state residency for tuition purposes; all aspects of personnel/employment law, including faculty tenure and promotion; university development; environmental health and safety; public contracting; constitutional rights; veterinary training and services; and capital planning and development, as well as operation of facilities. Division attorneys also provide representation on non-tort related litigation in a variety of forums.

## Numbers/Trends

Division workload continues to grow as the university continues to grow and expand its branch campus programs and its research efforts. Almost 22,000 students currently are enrolled at the main campus in Pullman and branch campuses in Spokane, the Tri-Cities, and Vancouver. Washington State University employs approximately 6,700 individuals, including personnel located at research stations, county extension offices,

and learning centers. The university is nationally recognized for its research in areas ranging from biotechnology and computer design to wood product use and agricultural marketing, and its research efforts are growing. During the past year, the university obtained more than \$108 million in external research funding, an increase of more than \$16 million over the previous year.

Washington State University Division

"One particular budget issue that the university will confront is the state of Oregon's decision to build its own college of veterinary medicine and to remove its students from the Washington/Oregon/Idaho regional program for veterinary medicine."

Major Issues/Events

**State Budget Issues:** Like all state agencies, the university shares the burdens of the state's current budget crisis. One particular budget issue that the university will confront is the state of Oregon's decision to build its own college of veterinary medicine and to remove its students from the Washington/Oregon/Idaho regional program for veterinary medicine. Division attorneys have helped the administration review options for stabilizing College of Veterinary Medicine funding when these students leave the program.

**Student Privacy:** The division routinely provides advice on the privacy of student records under the federal Family Educational Rights and Privacy Act (FERPA). In addition, this year division attorneys have advised university personnel regarding their reporting duties to Immigration and Naturalization Service pursuant to the Student and Exchange Visitor Information System (SEVIS).

**Addressing the University's Energy Needs:** The university's 83-year-old steam plant, which supplies heat for the entire Pullman campus, is badly in need of repair. Last year, the university explored the possibility of building a cogeneration plant (i.e., a plant that would generate both steam and electricity) in partnership with a private entity. Changing energy markets and costs made that plan economically impossible. The university is now moving forward with a new "steam only" plant.

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# **Protecting the Public**

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# Criminal Justice Division

**"The mission of the Criminal Justice Division (CJD) is to work with and support its partners in the criminal justice community, and to work towards creating safe communities."**

## ● Summary of Responsibility

- The mission of the Criminal Justice Division (CJD) is to work with and support its partners in the criminal justice community, and to work towards creating safe communities. The Criminal Justice Division represents and advises the Department of Corrections (DOC), Indeterminate Sentence Review Board (ISRB), Washington State Patrol, Governor's Clemency and Pardons Board, the Governor's Office on extraditions and detainers, and the Criminal Justice Training Commission. The division investigates and prosecutes Medicaid fraud and resident abuse, environmental violations, and tax fraud cases on behalf of the state. It civilly commits previously convicted sexually violent predators that have served their criminal sentences and that still pose a serious threat to reoffend.
  - The division responds to all federal habeas corpus petitions that result from state felony convictions, including capital cases.
- Upon request from the Governor, local law enforcement and local prosecutors, the division investigates and prosecutes criminal cases throughout the state. It also provides investigative and prosecutorial support to local law enforcement and prosecutors in computer and high tech related crime. The CJD provides state and nationwide investigative expertise and assistance through the office's Homicide Investigation Tracking System (HITS) Unit, and through the investigators and crime analysts who are part of HITS.
- The CJD also serves several other criminal justice clients. Among these are the Jail Industries Board, State Toxicology Lab, Sentencing Guidelines Commission, and State Forensic Investigation Council. Finally, the CJD represents the state in reimbursement claims that result from self-defense acquittal claims.

## ● Legal Services Provided

- **Corrections Unit:** The Corrections Unit represents DOC and its employees in state and federal court litigation. In these actions an inmate claims a violation of their constitutional rights during incarceration. These claims deal with the conditions of confinement, access to courts, freedom of speech, or due process of law. The other major area of representation is in personal restraint petitions filed by inmates challenging administrative or disciplinary action taken against them by DOC. This unit also provides advice and training for DOC in many areas including: search and seizure, access to courts and public disclosure. Attorneys in this unit also review draft DOC policies and contracts for constitutional and legal issues and represent DOC in some parole revocation proceedings before the ISRB.
- **Sentencing/Habeas Corpus Unit:** This unit represents the state and the DOC in challenges to the fact or duration of confinement resulting from a state court felony conviction. A key responsibility of this unit is to handle the continued prosecution of death penalty cases and other convictions in federal court. Unit



## Criminal Justice Division

staff represent DOC in post sentence petitions, which involve correcting errors in criminal judgments and sentences. The unit also represents the ISRB in challenges to its discretionary decisions relating to

release of offenders under its jurisdiction. Finally, the unit advises the Governor's Office on clemency and pardon matters and on interstate extradition matters.

### **Medicaid Fraud Control Unit (MFCU):**

The MFCU is a federally mandated investigative and prosecutorial unit staffed by attorneys, auditors, investigators, and support personnel. The function of the unit is to investigate and prosecute both fraud by health care providers that illegally divert Medicaid funds and the criminal abuse and neglect of residents in Medicaid funded facilities. This unit receives 75 percent of its operating funds from a federal grant.

MFCU is comprised of two stand-alone sections, the Resident Abuse Section and Fraud Section. MFCU and local law enforcement established the Vulnerable Adult Contact Network which fosters more timely and more meaningful responses by local law enforcement to complaints of vulnerable adult abuse and neglect.

The Fraud Section works closely with the state Medicaid program integrity team and with a variety of federal investigative agencies. The Fraud Section investigates and prosecutes medical providers, such as, doctors, denturists, physical therapists, nursing homes and hospitals, who have contracted with the Medicaid agency.

### **Sexually Violent Predator Unit (SVP):**

The SVP Unit was established in 1990 following enactment of RCW 71.09 which permits the involuntary civil commitment of sex offenders who, because of a mental abnormality and/or personality disorder, are likely to commit predatory acts of sexual violence if they are released to the community.

The unit is responsible for prosecuting sex predator cases for 38 of Washington's

It coordinates, when appropriate, its investigations with the Office of Inspector General, Health and Human Services, and the FBI - Fraud Section attorneys are cross-designated as Special Assistant United States Attorneys.

The Resident Abuse Section (RAS) provides valuable assistance to local law enforcement and prosecutors in investigating and prosecuting crimes committed against vulnerable adults. This assistance ranges from providing advice on pending investigations to taking over an investigation due to conflict or caseload reasons. The unit also prosecutes or assists local prosecutors in charging and trying criminal cases of abuse or neglect. On a monthly basis, RAS trains cadets at the Basic Law Enforcement Academy and coordinates with several jurisdictions statewide to develop and participate in local vulnerable adult task forces. Their mission is to improve the response to crimes committed against this population. Regular training by RAS that is provided to other investigative agencies that respond to abuse and neglect complaints has resulted in a closer working relationship with law enforcement.

39 counties (King County being the exception). The expertise of the unit permits it to handle all aspects of sex predator cases, including pre-filing investigations, pre-trial motion practice, trial, post-commitment proceedings and appeals. Attorneys appear before both state and federal courts. The unit also employs two investigators who work with the attorneys and paralegals to identify and locate witnesses and otherwise prepare cases for filing and trial.

**"The Resident Abuse Section (RAS) provides valuable assistance to local law enforcement and prosecutors in investigating and prosecuting crimes committed against vulnerable adults."**

## Criminal Justice Division

**"HITS is a national leader in developing and using computers in innovative ways to prevent crimes and increase the solvability of crimes."**

- **Homicide Investigation Tracking System Unit:** HITS is a program within the Attorney General's Office that tracks, investigates and maintains a searchable database of homicides, rapes and other violent crimes. It is the only statewide central repository for information relating to violent crimes. Investigators have collected data from more than 7,200 murder investigations and more than 7,600 sexual assaults. Investigators assist local law enforcement in the investigation of

violent crimes when requested. Typically, HITS will respond to approximately 500 requests for assistance or information each year.

HITS is a national leader in developing and using computers in innovative ways to prevent crimes and increase the solvability of crimes. It has been the recipient of several grants to study trends or common characteristics in violent crimes.

- **Criminal Litigation Unit (CLU):** When requested by the Governor, county prosecuting attorneys or the Organized Crime Intelligence Unit of the Washington State Patrol, the CLU investigates, assists with and prosecutes complex criminal cases. These types of cases include multi-county crime, white-collar crime, governmental corruption or cases where the local prosecuting attorney has a conflict of interest. This unit may also assume responsibility for the appellate review of a criminal case originally brought by a county prosecutor if that case involves fundamental issues affecting the public interest and the administration of justice. Operating as part of the CLU are the Environmental Crimes Unit, Financial Crimes Unit and High Tech Unit.

The Financial Crimes Unit is funded by the Department of Revenue, which refers cases from its Audit and Compliance Division. These cases generally involve the statewide investigation and prosecution of tax fraud cases as well as false statement and theft crimes committed against the state. The unit also assists state agencies in the areas of fraud detection and training.

- The Environmental Crimes Unit investigates and prosecutes significant criminal violations of our state and federal environmental statutes. This is accomplished in conjunction with a joint criminal investigation task force comprised of investigators and agents from the state Department of Ecology and the U. S. Environmental Protection Agency.

The High Tech Unit was created in 1999 to assist local law enforcement and county prosecuting attorneys in their efforts to respond to complaints of computer-related crime and to educate and promote the protection of the citizens and institutions of the state of Washington from the use of computers, technology and the Internet for criminal enterprises. Through the creation of this unit, the Attorney General's Office has acquired expertise in the investigation and prosecution of Internet and computer crimes and has developed the ability to conduct limited forensics computer work.

## Numbers/Trends

- **Corrections Unit and Sentencing/Habeas Corpus Unit:** In 2002, the DOC's "in custody" population reached over 16,000 inmates. These inmates are

housed in DOC's 13 prisons and 18 pre-release and work-release facilities. In addition, DOC has over 90,000 offenders subject to its jurisdiction. The increase

## Criminal Justice Division

in the offender population will continue to drive an increased demand for legal services. In 1999, the state Legislature enacted the Offender Accountability Act (OAA), a new approach to sentencing and post incarceration supervision that places responsibility for conducting most community custody violation hearings with the DOC, rather than the courts. As this new law is tested, this too will have a significant impact on the demand for legal services. Because courts, attorneys and offenders are unfamiliar working with the OAA it is expected that there will be an increase of actions to correct defective "Judgments and Sentences."

There were approximately 800 new cases opened on the combined dockets of the Corrections and Sentencing Units in 2002: 220 habeas corpus cases (of which 93 were appeals); 92 civil rights cases (of which 30 were appeals) in federal court; 17 civil rights cases in state Superior Court; 226 personal restraint petitions; 2 parole

revocation hearings; 194 post sentence petitions; 12 public disclosure cases; 22 self-defense reimbursement cases; and 27 miscellaneous cases. Also in 2002, approximately 510 cases of a variety of types were closed.

As noted above, the Sentencing Unit handles the federal court review of all state death penalty cases. Eleven individuals are currently under sentence of death, three individuals are under prosecution at the state trial court level, and ten cases at the investigation level are pending a decision to seek the death penalty. These cases will dictate the future workload of the division. Currently, there are five active death penalty cases in the division. The unit has an expanded role in assisting local jurisdictions in defending capital sentences at the state direct appeal and personal restraint petition stages. This is consistent with the division's mission to be a partner with others in the criminal justice community.

**"The unit has an expanded role in assisting local jurisdictions in defending capital sentences at the state direct appeal and personal restraint petition stages."**

**Medicaid Fraud Control Unit:** In the past year the MFCU concluded a number of fraud and resident abuse investigations with the filing of charges, and the referral of cases to county prosecutors for their review and action. The unit, with its federal partners, concluded fraud cases resulting in approximately \$1.3 million in restitution, investigative costs, fines and overpayments being ordered. At any given time during the year, the unit had approximately 165 fraud and resident abuse cases under active investigation.

The RAS played a leadership role in the way that resident abuse and criminal neglect complaints are processed from the state hotline, investigated for prosecution, and prosecuted or referred to licensing agencies for administrative action. The RAS received 159 complaints of crimes committed against vulnerable adults. Investigations were conducted in approximately 87.5 percent of those cases and criminal charges filed in six cases.

**Criminal Litigation Unit:** Approximately 50 cases are referred annually to the CLU for general assistance, investigation and/or prosecution. Most requests come from prosecuting attorneys, with a few coming from the Governor. Additionally, on an annual basis, 30-40 cases are referred to the unit for assistance at the trial or appellate court level.

The unit also fields a high number of general assistance requests about criminal prosecution matters from jurisdictions throughout the state and country. A significant portion of these calls for assistance, representing approximately 160 hours per year, pertain to questions about complex litigation matters.

## Criminal Justice Division

**"Washington was the first state to enact a sexually violent predator law to protect its most vulnerable citizens from predatory sex offenders who suffer from a mental abnormality or personality disorder which makes them likely to reoffend."**

- As a result of the work of the Financial Crimes Unit this year, seven defendants were sentenced for stealing state sales tax. In these cases, the defendants received community service, jail, and/or prison sentences, the courts ordered \$1,429,338.52 in restitution, and the defendants repaid \$750,583.21 by the time of sentencing. In addition, several

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● **Sexually Violent Predator Unit:** Washington was the first state to enact a sexually violent predator law to protect its most vulnerable citizens from predatory sex offenders who suffer from a mental abnormality or personality disorder which makes them likely to reoffend. Since 1990, many other states have used Washington's sex predator law as a model in enacting similar statutes. The unit has been able to provide assistance to these

- .....  
● **Homicide Investigative Tracking System Unit:** HITS currently has a supervisor and six investigators with more than 100 years of combined violent crimes experience. The HITS computer contains more than 1.8 million informational records with access to an additional 16 million. All law enforcement agencies in the state voluntarily provide information to HITS and have access to staff for assistance in their investigations.

- The demands on HITS continued to increase in 2002. HITS investigators have been actively involved in major multi-agency task force investigations with the Royal Canadian Mounted Police, the state of Oregon, the Spokane Homicide Taskforce, and the Green River Taskforce. With the significant improvement in DNA technology, it is predicted that there will be increased need for investigative coordination with law enforcement agencies. HITS staff is participating with the Washington State Patrol Crime Lab in a grant to identify "cold cases" in which evidence could contain DNA. The

other cases for DOR are pending charging, trial, or sentencing.

This year, the High Tech Unit refined the role it seeks to play in the criminal justice arena. In addition to a tremendous amount of training conducted the amount of forensic work done by the HTU nearly doubled from 2001.

other states because of its vast experience dealing with sexually violent predators.

Approximately 25 were referred to the unit in 2002 to determine whether to initiate a sexually violent predator action seeking the civil commitment of those persons. This past year, the unit filed eight such actions. In addition, the unit obtained commitments in eight cases.

HITS computer will generate cases for the Crime Lab grant.

In 2002, HITS received 507 requests for assistance from law enforcement agencies. The requests included name searches, case comparisons, analysis/profiling, verification of informant information, resource information, and vehicle searches. Among those requests, 124 bulletins were sent out statewide. HITS investigators took over the responsibility of teaching two classes at the Criminal Justice Training Center, including 80 hours of Basic Homicide Investigation and 80 hours of Criminal Investigation. HITS investigators also coordinated and presented two, eight-hour seminars on Cold Case Investigation and DNA Technology to approximately 250 law enforcement officers.

In 2002, the HITS Unit finished collecting data on a grant received in 1998 from the Office of Juvenile Justice and Delinquency Prevention to continue the Child Abduction Murder Study. Data

## Criminal Justice Division

was collected on 180 cases, which will be used to examine the characteristics of the killers of abducted children. The results of the first phase of the original research have been disseminated nationally and are highly regarded as an important tool in preventing and investigating these crimes. Also, members of the HITS Unit are nationally recognized experts in case management of child abduction murder investigations and have consulted with investigators from several states regarding ongoing investigations. Although the Child Abduction Murder Training Grant was completed in 2001, over 150 law enforcement investigators in the states of Missouri and Washington were trained. The objective of the training was to disseminate the results of the initial child abduction murder research.

In 1997, the Legislature provided funding for HITS to develop a Supervision Management and Recidivist Tracking (SMART) System. Full development of the SMART System continued in 2002. SMART will allow the DOC and local law enforcement to better communicate about offenders and their conditions of supervision. This will increase the number of individuals who are "monitoring" an offender's behavior in the community. All of the offender contacts with police are kept in the HITS database for later use in violent criminal investigations. The HITS Unit will continue to work on developing and building the SMART system, making it more accessible to the local jurisdictions. The pilot project with DOC and King County agencies will begin in 2003.

**"SMART will allow the DOC and local law enforcement to better communicate about offenders and their conditions of supervision."**

## Significant Cases and Their Impact

**Benn v. Lambert:** In this capital habeas corpus case, the Ninth Circuit affirmed the district court's order granting the writ and setting aside Benn's Pierce County conviction and sentence of death on the ground that the prosecutor had failed to disclose certain exculpatory information

and documents to defense counsel. *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002). The Supreme Court denied the state's petition for certiorari. The Pierce County Prosecuting Attorney has initiated new trial proceedings in the superior court.

**Nash v. Lambert:** This non-capital habeas corpus case involving a 1990 King County aggravated murder conviction has been in the federal courts for nearly six years and was remanded by the Ninth Circuit for an evidentiary hearing on the issues of ineffective assistance of counsel, breakdown in communications between Nash and counsel, and conflict

of interest by counsel. After conducting the evidentiary hearing the district court ultimately issued a 43-page decision denying Nash's habeas petition, concluding that Nash had lied about the supposed breakdown in communications and had lied about his counsel's alleged efforts to suborn perjury. Nash has appealed to the Ninth Circuit.

**Pirtle v. Morgan:** Pirtle was sentenced to death in Spokane County Superior Court in 1993 for two counts of aggravated murder. His conviction and sentence were upheld twice by a unanimous Washington Supreme Court. However, the federal district court

set aside the death sentence, concluding that the admission of a statement made by Pirtle at the time of his arrest rendered the penalty phase of the trial unfair. *Pirtle v. Lambert*, 150 F.Supp.2d 1078 (E.D. Wash. 2001). Both parties appealed to

Criminal Justice Division

- the Ninth Circuit. On December 19, 2002, a panel of the Ninth Circuit issued a 2 to 1 decision reversing Pirtle’s underlying conviction on the ground that defense counsel provided ineffective assistance by failing to request a jury instruction on  
.....
- In Re Personal Restraint of Calhoun:** Calhoun filed a personal restraint petition challenging DOC’s authority to return him to prison on his original sentence of confinement following a superior court’s dismissal of a sexually violent predator action. Calhoun argued that DOC had released him to the community and therefore had to place him on community  
.....
- In Re Personal Restraint of Hutchinson:** Hutchinson was convicted of two counts of aggravated murder in 1989 in Island County. His conviction and life-without-parole sentence were previously upheld by the Washington Supreme Court. In this personal restraint petition (which was denied by the Court of Appeals), the Supreme Court held that (1) the trial court properly excluded the defense  
.....
- In Re Personal Restraint of King:** In this case, the Washington Supreme Court held that DOC’s policy of running the mandatory portions of an offender’s sentence (such as a firearm enhancement)  
.....
- State v. White:** This was an unusual situation in which, in the context of a criminal proceeding, the prosecution and the defense jointly asked the Kitsap County Superior Court to hold DOC in contempt for failing to conduct a pre-sentence investigation in a non-sex offense case. DOC opposed the motion based upon the  
.....
- State v. Garrett:** The CLU assumed responsibility for this aggravated first degree murder and two counts of burglary in the first degree case from the Chelan County Prosecuting Attorney’s Office due to a conflict. The defendant is alleged to  
.....
- the defense of diminished capacity. As this report is being written, the office is in the process of seeking rehearing en banc by the Ninth Circuit, with a view toward possibly seeking certiorari review in the U. S. Supreme Court.
- custody. DOC argued that Calhoun had never actually been released from his confinement sentence but instead had merely been transferred to the custody of the King County Jail for the SVP trial. The court of appeals agreed with DOC’s position and denied the petition. Calhoun is seeking discretionary review by the Supreme Court.
- of diminished capacity as a sanction for Hutchinson’s refusal to submit to a psychological examination by the state’s expert, and (2) defense counsel did not provide ineffective assistance by advising Hutchinson to refuse to submit to the examination. CJD represented the state on behalf of the Island County Prosecuting Attorney. The trial and direct appeal were also handled by CJD.
- prior to the non-mandatory portions violated the prisoners’ statutory right to early release credits earned during pretrial detention.
- separation of powers doctrine. The statute did not mandate that DOC conduct such an investigation in non-sex offense cases, and the Legislature had withdrawn funding for such investigations. The superior court agreed with DOC’s position and denied the motion for contempt.
- have executed a video store clerk in a robbery. The defendant, released from prison five days before the murder, is also alleged to have committed several other crimes prior to his arrest. Trial is anticipated to begin in late 2003.

## Criminal Justice Division

**State v. Bastida:** The CLU convicted this Grant County defendant of Manslaughter in the First Degree for killing a young man with a stolen firearm. This case involved a significant self defense issue. The CLU

assumed jurisdiction in the case after the deceased boy's family sued the county under a negligent supervision while on probation theory.

**State v. Myers:** This defendant was convicted of stealing over \$330,000.00 in misappropriated sales tax revenue. In addition to receiving a term of jail

confinement, she was ordered to make full restitution plus interest and penalties to the state of Washington.

**State v. Anderson:** This defendant was convicted of stealing over \$100,000 in misappropriated sales tax revenue. Prior to sentencing, the defendant reimbursed

the state for \$101,000 in restitution, and in addition to a term of confinement and supervision, the defendant will have to repay interest on the stolen money.

**State v. Hasson, Snoey, and Strickler:** These three defendants were collectively convicted of misdemeanor violations of the state clean water act and a felony violation for their roles in illegally mishandling plant discharges at the city of Ridgefield Sewage

Treatment Plant. In addition to punishing these three defendants criminally, the Department of Ecology instituted civil actions to ensure that future employees comply with Washington water laws.

**State v. Batson:** Following trial, this Okanogan County defendant was convicted of intimidating a judge, intimidating a witness, and threatening to bomb or injure government property. The defendant was

deemed especially dangerous because he had previously blown off one of his arms in a bombing incident several years earlier.

**State v. Simmons:** The defendant in this case was convicted of persistent prison misbehavior following longstanding violations of prison rules. The final violation resulted in severe flooding to a prison block. The defendant was

sentenced to an additional 22 months in prison and ordered to make restitution. The defendant's appeal in this case will test the constitutionality of the statute making prison violations a criminal offense.

**State v. Lindholm:** The CLU prosecuted this defendant, the Spokane County Coroner, for felony drug possession. Because he had no prior convictions and was deemed amenable to treatment, the

Spokane County Superior Court accepted him into a drug treatment diversion program where is currently undergoing a two year treatment program.

**State v. Keith:** The Director of Victim Services for the Spokane chapter of Mothers Against Drunk Drivers (MADD) was convicted of felony theft

for embezzling over \$4,000 of MADD's funds. In addition to a term of jail confinement, the defendant was ordered to make full restitution to the organization.

**In Re Detention of Albrecht:** This sexually violent predator case, argued before the state Supreme Court, will determine if the state needs to prove

a recent overture occurred when an offender is serving time for a sexually violent offense.

Criminal Justice Division

"MFCU took a leadership role in negotiating multi-state settlements in two national fraud cases."

- **In Re Kuehn:** In this Pierce County case, respondent Brian Kuehn, a child molester, was civilly committed as a sexually violent predator. Prior to his commitment, Kuehn had been convicted of three prior sexually violent offenses.
- **In Re Pettis:** In this Clark County case, the respondent was civilly committed as a sexually violent predator. Prior to his commitment, Pettis had been convicted of four sexually violent offenses.
- **MFCU National Fraud Cases**
- MFCU took a leadership role in negotiating multi-state settlements in two national fraud cases. In each of these cases, MFCU played a key role in conducting nation-wide investigations, prosecutions and coordinating the cases with other attorneys general offices around the country.
- **United States v. Pfizer/Parke Davis (Texas):** This was a qui tam case filed in Eastern District of Texas alleging that Pfizer had understated its Medicaid best price. This miscalculation was a result of Pfizer's failure to factor in an "unrestricted educational grant" given to a Louisiana HMO to put the Pfizer drug Lipitor on an unrestricted formulary. This global settlement was negotiated on behalf of 48 states and District of Columbia by the Washington MFCU and \$49 million will be distributed to the state Medicaid programs. Washington State's share was \$875,000.
- **Columbia/HCA Phase II:** Columbia/HCA is the largest hospital chain in the country. The case was a cooperative federal/state investigation which lasted five years. Recently the Department of Justice announced a \$631 million federal settlement and the 33 participating states agreed to a \$17.5 million settlement. The total of both phases (federal and state) was \$1.5 billion. The state's share of both settlements was \$68,500 negotiated by the MFCU.
- **United States v. H. Richard Winn:** (Western District of Washington) - Dr. Winn, head of the Department of Neurological Surgery at the University of Washington School of Medicine from 1983 to present, pleaded guilty on July 16 to a charge of obstructing a criminal health care investigation. He entered this plea after lengthy negotiations with the U. S. Attorney's Office and the MFCU. On October 28, 2002, Judge Robert Lasnik sentenced Dr. Richard Winn. He received five years probation, was ordered to perform 1000 hours of free medical services to the community, pay a fine of \$4,000, and make restitution of \$500,000 to be shared by Medicaid (\$245,439), Medicare (\$242,814) and Tricare (\$11,747). The court consented to the defendant's request to be allowed to perform the free medical services in Nepal. As part of his probation, the doctor must write an article concerning the need to comply fully with healthcare investigations. Additionally, the doctor is not to retaliate against any of the witnesses who participated in the investigation.
- **State v. Coleman, State v. Fisher, State v. Gustafson, State v. Hedgemon, State v. Jeter, State v. Jones, State v. Jones, State v. Kramer, State v. Laginikoro, State v. McCleary, State v. Veregge, State v. Watkins:** All of these cases involved home health providers funded by Medicaid programs. MFCU investigated



## Criminal Justice Division

and successfully prosecuted individuals who billed for services never performed for homebound Medicaid recipients. These prosecutions resulted in a total in excess of

\$62,000 in restitution ordered by various courts. In addition, each defendant has been excluded from participating in any federally funded health care program.

**State v. Hedgemon and State v. Watkins:**

Charleana Hedgemon and Sarah Watkins were convicted of Medicaid False Statement and criminal mistreatment in the second degree. Chore Services were billed in the name of COPES provider, Charleana R. Hedgemon, for caring for Hedgemon's stepfather, Freddie Watkins. Mr. Watkins is a quadriplegic who also has a closed head injury resulting from an auto accident in Louisiana in 1997. Mr. Watkins remained hospitalized in Louisiana until his family brought him to Washington State seeking better medical attention. He was admitted to a nursing facility when he arrived in Washington and remained there until December 1998. Charleana R. Hedgemon became an individual personal provider for the purpose of caring for Freddie Watkins on December 8, 1998. Invoices were submitted each and every month from December 1998 through August 1999 attesting that the service was provided by Charleana R. Hedgemon to Freddie Watkins for those months. Payment was made by DSHS for those months beginning in January 1999 and ending in September 1999. Without advising DSHS, Charleana R. Hedgemon left the state of Washington returning to her home state of

Louisiana in January 1999. Hedgemon's inability to provide authorized hours of care for her stepfather, Freddie Watkins, resulted in an overpayment of \$9,280.96. Sarah A. Watkins, as Freddie's wife, was not eligible for COPES payments

In September of 1999 local law enforcement conducted a "welfare check" at the Watkins residence. The victim, Freddie Watkins, was found in the basement unresponsive, with multiple contractures, covered in feces and urine, flies all over him and with multiple severe decubitus ulcers. The victim was transported to the hospital in critical condition.

The case was investigated and prepared for prosecution by the MFCU and then referred for filing to the King County Prosecutor's Office. Each defendant pled guilty as charged. Charleana, the stepdaughter/caregiver, was sentenced to 98 days in jail and full restitution. Sarah Watkins, the wife of the victim, received 150 days in jail and was ordered to pay full restitution, also. Each defendant was ordered to have no contact with the victim for a five-year period.

# Government Compliance & Enforcement Division

**"The division's 24 attorneys and 16 professional support staff provide a wide range of legal services to their clients."**

## ● Summary of Responsibility

- The Government Compliance and Enforcement Division, formed in 2001, provides legal advice to the State Auditor, the State Insurance Commissioner, Department of Financial Institutions, the Gambling Commission, the Horse Racing Commission, the Human Rights Commission, the Office of Minority and Women's Business Enterprises and the Joint Legislative Audit and Review Committee. It also handles the enforcement and forfeiture litigation
- for the Washington State Patrol, Public Disclosure Commission, Gambling Commission, State Lottery, Liquor Control Board, Department of Financial Institutions, Human Rights Commission, Horse Racing Commission, and State Executive Ethics Board. The division is responsible for the professional licensing litigation for the Department of Health. Finally, the division acts as the statutory Counsel for the Environment.

## ● Legal Services Provided

- The division's 24 attorneys and 16 professional support staff provide a wide range of legal services to their clients. The division is divided into three sections. The Advice and Compliance section provides legal advice on general issues affecting government agencies such as administrative law, federal preemption of state laws and regulations, investments, contracts, finance, public records and ethics in government service. It also provides two elected officials with a wide range of advice regarding issues that are uniquely within the scope of their constitutional and statutory responsibilities. Attorneys for the Insurance Commissioner handle enforcement proceedings, rate hearings, insolvency proceedings, public disclosure requests and health care litigation. Attorneys for the Auditor's Office provide advice on legal compliance issues related to state and local government financial audits and state whistleblower investigations, monitor recovery efforts when fraud is reported, and handle enforcement action that may arise from the audit process. Two attorneys from the
- section also are appointed as members of the State Records Committee and Local Records Committee, respectively, which are charged with approval of public record retention schedules establishing how long public records must be retained prior to destruction.
- The Enforcement/Forfeiture section prosecutes cases at the administrative level and on appeal of violations of campaign, discrimination, minority contracting, banking and securities, liquor, gambling, lottery, cigarette tax, and ethics laws. The section also handles Indian Gaming Compact advice and litigation, drug seizure litigation and RICO/money laundering cases. Finally, section attorneys act as the Counsel for the Environment on all matters related to the siting of energy producing facilities.
- The Health Licensing section prosecutes health care providers for allegations of misconduct and violations of the Uniform Disciplinary Act.

# Government Compliance & Enforcement Division

## Numbers/Trends

**Liquor Control Board:** In 2001, 120 cases were opened involving violations of state liquor and cigarette laws. The majority of the cases involved overservice and sale of alcohol or cigarettes to minors. A few cases also involved the seizure

of unstamped cigarettes and vehicles transporting these cigarettes. The number of actions handled by this division shows an increase from the 101 cases handled in 2001.

**Gambling Commission:** The division handled 47 new gambling citation cases in 2002. This is an increase from 30 cases last year. The division anticipates that the number of authorized gambling

establishments will rise in the year 2003, bringing an increase in the number of enforcement actions it handles on behalf of the commission staff.

**Public Disclosure Commission:** The division saw an increase to 109 matters opened in 2002 on behalf of the commission. Twenty-seven of the cases were enforcement based and 82 outstanding penalties submitted to the

Attorney General's Office for collection. In the year 2002, the division worked actively with Commission to collect these outstanding fines without the need to commence court action.

**Executive Ethics Board:** The Executive Ethics Board had one of the most dramatic increases of all the clients represented by the division. In 2001, the board received 99 complaints, which led to 89 cases being

investigated and resolved. In 2002, the board received 87 complaints, which led to 73 cases being investigated and resolved.

**Insurance Commissioner:** In 2002, the division handled nine licensing actions against agents and 19 enforcement actions

against insurers, in addition to advising the agency on the legal sufficiency of many other enforcement matters.

**State Auditor:** In 2002, the division provided legal advice to the Auditor's Office on 56 whistleblower investigations involving 83 assertions of improper governmental action, 45 of which were substantiated. The division also received and monitored 14 cases involving reported audit findings of fraud in state and local government. Additionally, significant

attorney time was devoted to resolving a wide variety of legal compliance issues that arose during legal/financial compliance audits of state and local government agencies, minimizing the resources necessary to follow-up and enforce audit findings. As a result, litigation arising from audit findings was limited to one case.

**Washington State Patrol:** The division opened 125 matters for the State Patrol in 2002, ranging from client advice to vehicle impound challenges to terminal

audits to drug forfeiture actions. More than \$176,000 in cash, real property and vehicles was forfeited as a direct result of drug forfeiture actions by the state.

**"The division anticipates that the number of authorized gambling establishments will rise in the year 2003, bringing an increase in the number of enforcement actions it handles on behalf of the commission staff."**

# Government Compliance & Enforcement Division

- **Human Rights Commission:** The division opened and handled 26 cases for the commission. This is a marked increase over the five cases opened in 2000 and 17 cases in 2001. More than \$43,000 in monetary damages was awarded to victims of discrimination and the state of Washington by way of administrative hearings with the commission.
- **Department of Health:** The division attorneys opened approximately 320 matters on behalf of the department's boards and commissions. In addition to the increase in cases from 2001, the complexity and length of time to try cases also increased dramatically as parties engaged in more active pre-hearing discovery and litigation than in past years.
- **Department of Financial Institutions:** Nine new cases were opened on behalf of the department, taking enforcement action against individuals and companies who violated the state financial laws, including securities, banking, mortgage lenders and consumer lenders.
- **Horse Racing Commission:** The division handled several enforcement matters for the Commission this year against trainers, a jockey agent and other racing participants. Additionally, the division staffed a license application to recommence racing at the Playfair facility in Spokane. This was the first such application in the past several years. The Commission granted a conditional license in the matter.

## Significant Cases and Their Impact

### Campaign Laws

- **Public Disclosure Commission v. Permanent Offense, a political committee, Tim Eyman, Suzanne Karr:** The division on behalf of the state of Washington and the Public Disclosure Commission sued, Permanent Offense, a political committee as well as Tim Eyman and Suzanne Karr for a variety of violations of state campaign laws, including actions by Eyman and Karr to conceal payments to Eyman from campaign funds. The case against the committee and Eyman has been resolved with the payment of \$55,000 by Eyman and \$5,000 by the committee. The case remains pending against Karr.

### State Auditor

- **Seattle v. Sonntag:** This case arose from an audit issue, supported by AGO 2001 No. 1, regarding the city of Seattle's lack of authority to shift the burden of public street lighting costs from general taxation to electric rates charged to customers of its electric utility. The trial court ruled cities lacked authority to include public street lighting costs in electric utility rates, and that imposition of such costs in electric utility rates constituted a tax. Seattle appealed and simultaneously obtained a statutory amendment arguably authorizing inclusion of public street lighting costs in electric utility rates. Subsequently, the Auditor's Office declined to further pursue the case. However, a citizen intervenor sought trial court clarification on the effect of the statutory amendment. The trial court ruled that the change in the statute authorized inclusion of street lighting costs in electric rates, and that such a charge

# Government Compliance & Enforcement Division

was not a tax. The intervenor is now seeking direct review by the Washington Supreme Court. As a result of this case, cities may be able to shift the costs of general governmental functions such as city-wide public street lighting, which are traditionally supported by general taxation, to individual utility customers based on

personal utility service consumption through the imposition of increased utility rates. The ultimate effect of shifting the costs of general government to utility rate payers through higher utility rates is to increase the tax revenue base available for other general government services without instituting a "tax" increase.

## Insurance Commissioner

**Premera Blue Cross:** The Premera Blue Cross organization has petitioned to convert from non-profit to for profit status. Division attorneys will provide legal advice to the commissioner during adjudicative proceedings on the proposed

conversion of Premera Blue Cross from a non-profit to a for-profit health insurer, as well as to the commission staff responsible for reviewing and presenting evidence at the hearing on the application.

**"Division attorneys will provide legal advice to the commissioner during adjudicative proceedings on the proposed conversion of Premera Blue Cross from a non-profit to a for-profit health insurer, as well as to the commission staff responsible for reviewing and presenting evidence at the hearing on the application."**

## Major Issues/Events

**Unauthorized \$20 Million Bond Issuance by Sewer District:** Division attorneys assisted the State Auditor's Office in its review of a \$20 million bond issue by Holmes Harbor Sewer District on Whidbey Island for financing the construction of a project in the city of Everett. Based on legal advice, the Auditor's Office concluded that the district lacked statutory authority to issue bonds

for such a project, as well as finding a number of other substantial legal problems with the handling of the bond proceeds. A number of private lawsuits, including a bond holder securities fraud action have resulted. That lawsuit was certified as a class-action suit in December 2002. Additionally, the Department of Financial Institutions filed security charges against the district and the bond underwriter.

**Cigarette Tax Enforcement:** The 1997 Legislature transferred authority to enforce cigarette taxes from the Department of Revenue to the Liquor Control Board. The board continued to be active in 2002, seizing untaxed cigarettes and vehicles

used to transport the cigarettes. The 2001 initiative that raised the tax on cigarettes could cause an increase in cigarette smuggling attempts thus increasing the division workload.

**Impoundment of Vehicles Driven by Persons with Suspended Driver Licenses:** The Washington State Patrol has statutory authority to impound vehicles driven by persons with suspended licenses. In 2001, a number of challenges to the WSP regulations on impound resulted in conflicting court decisions interpreting a recent amendment to the state impound statute. In late 2001, the Washington

Supreme Court accepted direct review of one case and ordered a second case pending in the Court of Appeals Division II transferred to the Supreme Court and consolidated with the first case on the issue of the legality of the state impound scheme. Argument before the Court was heard in May 2002 and it is anticipated that a decision resolving the conflict in late 2002 or early 2003.

EFSEC. These proposals include Duke Energy's Satsop Phase II project located near Satsop in Grays Harbor County; Cogentrix's Mercer Ranch project near Patterson in Benton County; BP's Cherry Point project located near Ferndale in Whatcom County; PPL's Starbuck project near Starbuck in Columbia County; and Newport NW's Wallula project near Wallula in Walla Walla County.

# Government Operations Division



## Summary of Responsibility

The Government Operations Division handles the litigation for, and provides legal advice to more than 30 state agencies and elected officials. These include the departments of General Administration, Retirement Systems, Military and Emergency Management, Information Services, and Personnel, the Washington State Senate and House of Representatives,

the Office of the State Treasurer, the State Investment Board, the Public Employment Relations Commission, the Lottery, the Energy Facility Site Evaluation Council (EFSEC), certain divisions and programs of the Office of Secretary of State, and other departments that provide services to government agencies or employees.

**"Attorneys in this division are actively involved in providing coordination and advice to all AGO divisions on contract law issues and e-commerce."**

## Legal Services Provided

The division's 16 attorneys and eight professional staff provide a wide range of legal services to their clients, including defense of multi-million dollar class-action lawsuits, construction litigation, advice on complex real estate transactions, financing and bonding issues, state investments, anti-terrorism efforts, and emergency management. In addition, the members of the division provide client advice and handle litigation on a

myriad of other issues such as contracts, computer hardware acquisition, software licensing, the siting of major energy facilities, the purchase of goods and services for government agencies, labor law, employee benefits, state employment, and National Guard matters. Attorneys in this division are actively involved in providing coordination and advice to all AGO divisions on contract law issues and e-commerce.

## Numbers/Trends

Due to the wide variety of client agencies, it is difficult to quantify workload for the division as a whole. The year 2002 continued to be a busy year for the division. The Department of Retirement Systems has the highest concentration of complex litigation, including several active class action lawsuits involving more than 250,000 class members. Retirement also generated a significant portion of our appellate caseload. The division's workload continues to be significantly affected by the September 11 attacks and

Homeland Security issues involving the state. The volume of work relating to debt financing for the State Finance Committee and the Office of the State Treasurer has continued to be steady due to favorable market conditions and new programs. Attorneys in this division will be involved with any legal issues that arise as the state deals with critical budget issues in the 2003 legislative session. There has also been a significant amount of legal work associated with the permitting of proposed energy facilities.



# Government Operations Division

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**"Since September 11 attorneys in the division have been coordinating with other members of the AGO to provide uniform advice on disaster planning, National Guard deployment, and the state's response to potential terrorist activity."**

- ## Significant Cases and Major Issues

- ### Anti-Terrorism

- **Military Department and Emergency Management:** Since September 11 attorneys in the division have been coordinating with other members of the AGO to provide uniform advice on disaster planning, National Guard deployment, and the state's response to potential terrorist activity. As nationwide efforts on Homeland Security develop, division attorneys are working on a broad variety of security and preparedness response issues.

- ### Retirement

- **Pension Class Action Litigation:** Over the last several years division attorneys have been defending the state in several class action cases involving rights to retirement benefits. Most of the cases involve questions of who should govern the retirement systems, and who should control the pension funds. During the last two years every superior court matter was resolved in the state's favor, and there were significant appellate victories. Several cases continue in appeals before the courts of appeal and the state's Supreme Court.

- **LEOFF Plan 2 Retirement System Board:** Pursuant to initiative I-790 approved by voters in 2002, a new retirement system board will come into existence in 2003. The state has not had a retirement system board for more than 20 years. Division attorneys will be working with the new board on set up, authority issues, and numerous other legal questions.

- ### Finance and Investment

- **State Finance Activities:** The Treasurer's Office has continued to work on refinancing significant portions of the state's general obligation debt to take advantage of low interest rates. Attorneys expect to work with a wide variety of financing questions over the next several years as the state explores options for handling budget and revenue issues.

- **State Investment Board:** Over the last year there has been a substantial increase in the number of large private equity and real estate investments by the Board requiring complex document review. Attorneys in this division continue to work with the board to integrate several new investment programs, and assist it in preparing legislation to update the laws under which the Board operates.

- ### Energy

- **Energy Facility Siting:** Over the last year the Energy Facility Site Evaluation Council has been working on numerous permits to locate new power facilities in the state. Attorneys in this division advise the council and assist with permit decisions. Over the next couple of years EFSEC anticipates applications for alternative energy facilities, and will be engaged in significant efforts to make the energy siting process more standardized and predictable.



# Labor and Industries Division

## Summary of Responsibility

**Industrial Insurance:** A major responsibility of the Department of Labor and Industries is the administration of the Worker's Compensation Act. The act is designed to ensure that injured workers are provided comprehensive benefits and services in a cost-effective manner. Under the act, L&I serves as the trustee and administrator of the \$4 billion workers' compensation trust fund which consists of premiums paid by workers and employers. L&I's Employer Services section has established a comprehensive program

for assessing and collecting insurance premiums. L&I also maintains programs to prosecute individuals who fraudulently collect workers' compensation benefits and to prosecute medical and vocational providers who commit fraud.

A crime victims' compensation program was established to compensate innocent victims of criminal acts. L&I administers the claims and pays benefits to those who qualify.

**Regulatory Functions:** The Washington Industrial Safety and Health Act (WISHA) requires L&I to administer a workplace health and safety program. Washington is one of 23 states which, rather than submitting to direct federal regulation in this area, administers a state-run Occupational Safety and Health Plan subject to federal oversight.

L&I's Employment Standards program enforces wage and hour laws, regulates

apprenticeship training, and monitors whether companies bidding on public works have complied with prevailing wage laws.

The Specialty Compliance Services division handles a variety of regulatory and enforcement functions including boiler inspections, electrical inspections, regulation of factory assembled housing, elevator inspections and contractor registration.

**"Individual attorney caseloads typically represent several million dollars in exposure to L&I's accident and medical aid funds and present complex medical, vocational and legal issues."**

## Legal Services Provided

L&I receives more than 15,000 claims for industrial insurance benefits each month. Although most of these claims are administered and resolved within L&I, more than 700 disputed claims per month are handled by Attorney General staff. These industrial insurance appeals constitute nearly two-thirds of the division's workload. Approximately 35 percent of these appeals are resolved by paralegals through a mediation process.

Individual attorney caseloads typically represent several million dollars in exposure to L&I's accident and medical aid funds and present complex medical, vocational and legal issues. A single pension case represents an average of \$450,000 in potential liability. Attorneys practice before the Board of Industrial Insurance Appeals and before the state courts at all levels.

# Labor and Industries Division

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**"Current caseloads for the division include more than 30 cases currently pending in state and federal appellate courts."**

## Numbers/Trends

- The Board of Industrial Insurance Appeals hears all appeals filed by injured workers and by employers. The BIIA granted approximately 8,700 industrial insurance appeals in fiscal year 2002.
- This represents a decrease of 7.5 percent from the number of industrial insurance appeals granted in fiscal year 2001.
- The BIIA granted approximately 415 WISHA appeals in fiscal year 2002. This represents an increase of 29 percent from the number of WISHA appeals granted in fiscal year 2001. Current caseloads for the division include more than 30 cases currently pending in state and federal appellate courts.

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## Significant Cases and Their Impact

- **WECARE, et. al., v. Department of Labor and Industries:** L&I promulgated rules establishing ergonomic standards in the workplace. The rules are intended to reduce the number and severity of muscular-skeletal injuries, including repetitive motion injuries, which represent both the most common sort of worker injury and the category generating the highest claim costs. A variety of businesses and trade associations initiated an action in superior court claiming procedural irregularities in the rule-making process and disputing the assumptions on which the rules were based. The superior court upheld L&I's rules in all respects. The Supreme Court has accepted direct review.
- **Rhodes v. Department of Labor and Industries and Related Cases:** Where a worker has received an award for permanent partial disability and later receives a pension, statutes direct L&I to reduce the pension award in a manner designed to recoup the PPD award. There are a number of cases pending in both superior court and at the BIIA that question the manner in which L&I effects the reduction. Among these cases is Rhodes, a class action recently dismissed by the superior court for plaintiffs' failure to exhaust administrative remedies.

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## Major Issues/Events

- **Cockle v. Department of Labor and Industries:** The state Supreme Court held in January 2001 that employer contributions for health care benefits provided to workers and their families constitute "wages" that must be considered when calculating workers' compensation benefits. Since this decision, claimants have been seeking to establish through litigation that various other benefits should also be included in the wage computation. This presents a significant workload issue for L&I, the BIIA, and the division.
- **Rios, et. al., v. Department of Labor and Industries:** L&I promulgated rules under WISHA designed to protect farm workers from pesticides. In addition, L&I developed a guideline recommending, but not requiring, blood monitoring of workers exposed to pesticides. Plaintiff farm workers appealed L&I's decision not to require blood monitoring. In February 2002, the state Supreme Court ordered L&I to "initiate rulemaking on a mandatory...monitoring program for

## Labor and Industries Division

agricultural pesticide handlers.” The rules, currently in development, are the subject

of close scrutiny by both business and labor organizations.

**Premium Increase:** In November 2002, L&I announced industrial insurance premium increases averaging 29 percent. The increases were largely attributable to stock market reversals affecting L&I administered trust funds, increases in the

costs of medical care and court decision that have tended to expand worker benefits. The increases are expected to prompt significant debate in the upcoming legislative session.

**Emerging Areas of the Law:** Attorneys in the division are working closely with L&I in matters that involve emerging areas of the law. L&I’s efforts include assisting the agricultural industry with farm worker safety issues, ensuring minimum wages for minors, reducing long term disability of injured workers, ensuring that injured

workers receive fair and competent vocational services, ensuring that workers are properly classified for purposes of industrial insurance coverage, and utilizing complex information systems to speed the delivery of benefits and services to injured workers.

# Labor and Personnel Division

**"The division provides client advice and assistance to its clients on a variety of personnel-related matters, such as the Americans with Disabilities Act, the Family Medical Leave Act, Fair Labor Standards Act, Washington Management Service and Merit System, and labor relations issues."**

## Summary of Responsibility

- The Labor and Personnel Division provides centralized employment and personnel-related legal services and expertise to state agencies and higher education institutions. The division currently supports all state agencies with the exception of the University of Washington, which receives its employment related legal services from the University of Washington division, and certain Western Washington higher education institutions, which receive employment-related legal services from the Education divisions.

## Legal Services Provided

- The division represents state agencies and higher education institutions in employee discipline, disability separation, and certain rule violation and reduction-in-force appeals before the Personnel Appeals Boards, and the various Washington State Patrol hearing boards. The division also represents agencies in unfair labor practice complaints and grievance arbitrations before the Public Employment Relations Commission, the Personnel Resources Board and the Marine Employees Commission. The division represents agencies in appeals of these administrative decisions to superior courts.
- The division provides client advice and assistance to its clients on a variety of personnel-related matters, such as the Americans with Disabilities Act, the Family Medical Leave Act, Fair Labor Standards Act, Washington Management Service and Merit System, and labor relations issues.
- Standards Act, Washington Management Service and Merit System, and labor relations issues. The division also handles wage-related cases in state and federal courts.
- Over the past year, the division has conducted training for state agencies on a variety of topics, including employee misconduct investigations, the Public Records Act, processing discovery, the Family Medical Leave Act, workplace violence, labor relations and reasonable accommodation. The division continues to sponsor monthly personnel manager meetings for state agency personnel staff to discuss case law updates as well as special employment-related issues. The division also sponsors bi-monthly personnel manager meetings in Eastern Washington.

## Numbers/Trends

- The division currently has an active caseload of approximately 345 cases. In addition, the division has approximately 652 pending files related to issues, subjects and situations upon which the division is called to give advice.

## Labor and Personnel Division

**Personnel Appeals Board:** There are 210 active cases before the board on employee appeals of agency disciplinary actions, alleged violations of merit system rules

by state agencies, separation of employees based on the inability to perform essential job functions, and layoffs.

**Personnel Resources Board:** The division's current caseload of five cases before the board involves grievance arbitrations under collective bargaining

agreements. This number reflects the continued trend of giving this work back to agencies and training agency personnel to represent themselves before the board.

**Public Employment Relations Commission:** The commission picked up unfair labor practices and questions concerning representation for state employees beginning in June. Currently,

the division has 19 unfair labor practices pending before the commission. It is expected that this number will increase as unionization increases.

**Marine Employees Commission:** The division currently has 24 grievance arbitrations and unfair labor practice charges pending before the Marine

Employees Commission. This number has remained fairly steady over the last few years.

**Tort Issues:** While the division no longer litigates employment related tort cases, it does provide proactive client advice on issues carrying tort implication and, where appropriate, engages in early

dispute resolution. The division works closely with the Torts Division to provide a continuum of employment related advice and representation.

**Judicial Review Appeals:** This past year, the division has experienced a slight decrease in the number of administrative cases being pursued through the state

courts. The division currently has 15 cases pending on appeal, either as judicial reviews or in the appellate courts.

**Miscellaneous:** The division handles other miscellaneous cases, which include Human Rights Commission complaints,

unemployment compensation, wage, contracting out and public disclosure claims.

### Major Issues/Events

**Wage Cases:** The division is currently handling three class action wage cases brought by employees of the Departments of Corrections and Social and Health Services. The employees seek overtime compensation for breaks and lunch periods

as well as time spent traveling between Steilacoom and McNeil Island on a boat operated by the DOC. The division is also handling two wage claims alleging a violation of the comparable worth statutes.

**Public Disclosure:** The number of requests for public employment records continues to rise. The rise has been dramatic in the area of state employee personnel records.

In challenging agency personnel decisions, it is no longer uncommon for litigants to request personnel files of agency staff. Additionally, individuals who are the

**"The division is currently handling three class action wage cases brought by employees of the Departments of Corrections and Social and Health Services."**

disclosure of completed investigative materials.

collective bargaining, including the right to bargain wages. Finally, the rules regarding contracting out of services will be relaxed. These changes all have an impact on the work of the division. The division is now advising state agencies and higher education institutions as the act phases into effect.

client agencies, including information on visa applications, assistance with agency personnel visa applications and representation before the Immigration and Naturalization Service.

# Licensing and Administrative Law Division

## Summary of Responsibility

The Licensing and Administrative Law Division was formed by the Attorney General along with two other new divisions in July 2001 to better align clients with similar interests and functions. The division provides full legal services to three state agencies: the Departments of Licensing, Employment Security, and the Board of Accountancy. It also provides legal advisors for a number of the state's boards and commissions, including the Public Disclosure Commission, the Liquor Control Board, the Redistricting Commission, the Salmon Recovery

Funding Board, the Environmental Hearings Office, the Executive Ethics Board, and the Legislative Ethics Board.

The division handled more than 2,000 cases this last year in a variety of administrative, state, and federal forums, with more than half coming to closure. The division has expertise in the areas of administrative and appellate procedure, public records and open public meeting issues, and professional and driver and vehicle licensing issues.

**"The division handled more than 2,000 cases this last year in a variety of administrative, state, and federal forums, with more than half coming to closure."**

## Legal Services Provided

The division's attorneys and professional staff provide legal services that include advice and counseling on rule-making, contracts, policy writing and proposed legislation, as well as representation in actions filed against client agencies and their employees and officers. In addition, attorneys represent the state in regulatory prosecutions before administrative tribunals, appeals to superior court of administrative hearing decisions, and in other actions against the state in the federal courts or the Washington State Courts of Appeal and Supreme Court.

The different kinds of steady litigation handled by the division include:

### State Board of Accountancy:

Professional licensing disciplinary cases initiated by the Board against accountants.

### Employment Security Department:

- Appeals in Washington State courts seeking review of claims in which unemployment benefits were denied to claimants or the granting of benefits to a claimant, appealed by an employer.
- Cases, usually at the appeal level, which seek payment of unemployment insurance taxes from employers, who either claim to be exempt from payment of the tax, challenge the change in status as a covered employer or claim that their tax liability should be less.

### Department of Licensing:

- Appeals in superior court where drivers challenge their breath test results or their refusal to take breath tests when suspected of drinking and driving.

Licensing and Administrative Law Division

- License suspension appeals in superior court for uninsured drivers involved in vehicle accidents where there is personal injury or property damage.
- Matters in superior court or in higher courts to defend challenges to driver license laws or agency decisions against drivers for other violations of the drivers license law, like driver improvement or commercial driver license suspensions.
- Regulatory misconduct matters brought before administrative law judges against professional licensees, such as real estate licensees and vehicle dealers, and tax assessment matters against motor vehicle fuel distributors.

Major Issues/Events

Department of Licensing-Vehicle Excise Tax

**Bruns, et al. v. Department of Licensing and Stephens:** This is a case arising out of the repeal of the motor vehicle excise tax (MVET) that went into effect on January 1, 2000. The registration year of most vehicles registered in 1999 extended into 2000. The plaintiffs seek refunds of the portion of the MVET paid in 1999 but attributable to 2000 since the MVET had ceased to exist on January 1, 2000. Plaintiffs seek certification as a class action. The plaintiffs have estimated the amount of refunds they seek as approximately \$200 million.

Public Disclosure Commission

**Washington Education Association v. Public Disclosure Commission:** This lawsuit is a challenge filed by the Washington Education Association (WEA) to the Public Disclosure Commission’s (PDC) Guidelines for School Districts in Election Campaigns. The guidelines explain the prohibition in RCW 42.17.130 on the use of public facilities to support or oppose campaigns for candidates or ballot measures. The statute was first codified after the passage of Initiative 276 in 1972. The King County Superior Court ruled that the WEA and its members, who are public school teachers, have a free speech and association right to use public facilities in the schools for campaigns, despite the prohibitions in RCW 42.17.130. The PDC appealed to the state Supreme Court. The appeal is pending.

**Redistricting Commission:** The Washington State Redistricting Commission is a unique organization, formed once every ten years in conjunction with the taking of the U.S. Census to redraw the state’s legislative and congressional district boundaries based on the Census results. The division provided legal advice to this commission over this last year. The commission created a plan that was accepted without challenge and implemented.

Burden of Proof

**Bang Nguyen v. Medical Quality Assurance Commission:** This 2001 case involved whether administrative disciplinary proceedings required proof by a higher standard, clear and convincing, as opposed to the preponderance standard.



## Licensing and Administrative Law Division

The state Supreme Court in a 5-3 decision held that the U.S. Constitution's due process clause requires the higher standard, because "a professional disciplinary proceeding subjects a medical doctor to grave concerns which include the potential loss of patients, diminished reputation, and professional dishonor."

The court further stated, "an inadequate standard of proof increases the risk of erroneous deprivation...." Therefore, the constitutional minimum standard must be more than mere preponderance. The decision has a significant impact on professional disciplinary cases.

**Eidson v. Department of Licensing:** This opinion followed the Nguyen Supreme Court case involving a real estate appraiser license. The Court of Appeals, Division

I, ruled the Nguyen case does not extend to real estate appraiser licensing discipline cases.

**Nims v. Department of Licensing:** The Court of Appeals, Division II, reviewed the issue of whether the "clear, cogent and convincing" burden of proof applied to disciplinary proceedings for professional engineers. In Nims, the court determined that the higher burden did apply, and

adopted reasoning that was different from the court in Eidson. The department did not appeal the decision, but anticipates this issue will come before the supreme court again as there is a split in the divisions on how to apply the Nguyen legal holding.

# Regional Services Division

**"The numbers and trends for the work in the division fairly well mirror those of the main divisions, with greater increases in rapidly growing areas such as Clark and Snohomish counties."**

## ● Summary of Responsibilities

- The Regional Services Division consists of seven offices located in Bellingham, Port Angeles, Everett, Vancouver, Kennewick, Yakima, and Wenatchee. There are a total of 43 attorneys, and 49 professional staff in the division. The division represents the Department of Social and Health Services, Department of Labor and Industries, the Department of Licensing, Employment Security Department, Western Washington University, Central Washington University and the following community and technical colleges: Peninsula, Whatcom, Bellingham Technical, Skagit Valley, Everett, Edmonds, Clark, Lower Columbia, Walla Walla, Columbia Basin, Yakima Valley and Wenatchee Valley, as well as the School for the Deaf, the School for the Blind, and several Educational Service Districts. Each of the Bellingham, Kennewick, and Vancouver offices has a Consumer Resource Center.
- The division's practice includes hearings before administrative boards as well as trials and appeals in state and federal court.

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## ● Legal Services Provided

- The Regional Services Division offices act as extensions of the main divisions and clients for whom they do work: Labor and Industries, Department of Social and Health Services, Education, Employment Security, and Department of Licensing.
- The specific legal services provided are similar to those listed in the reports for those divisions, with a heavy emphasis on litigation at the administrative and superior court level.

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## ● Numbers/Trends

- The numbers and trends for the work in the division fairly well mirror those of the main divisions, with greater increases in rapidly growing areas such as Clark and Snohomish counties. In 1988, the division had 21 attorneys in 5 offices. Due to increase in workload over the past 14 years, the division has added two offices, Wenatchee and Port Angeles, and doubled the number of attorneys and professional staff.

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## ● Significant Cases and Their Impact/ Major Issues/Events

- Cases of significance and major issues and events are included in the main divisions' reports.

# Social and Health Services Division

## Summary of Responsibility

DSHS administers a variety of federally and state-funded programs to protect the general public and those who are unable to provide for themselves. Programs include income and medical assistance, food stamps, children's services, child support, mental health, developmental disabilities, juvenile rehabilitation, alcohol and drug rehabilitation, vocational rehabilitation, nursing home surveys, adult protective services, home and community care services, and other related community social services program activities.

Five divisions of the Attorney General's Office provide legal services to DSHS in addition to the specialized services of the

Torts Division and Labor and Personnel Division. The majority of legal support to DSHS falls into two main areas: children's services litigation and advice and representation for DSHS headquarters in Olympia. Currently, 70 percent of the legal services support juvenile dependency and parental rights termination cases, as well as the other child welfare services programs.

In addition to representing DSHS, the Social and Health Services Divisions also provide legal support to the Department of Veterans Affairs and the Department of Services for the Blind.

**"Currently, 70 percent of the legal services support juvenile dependency and parental rights termination cases, as well as the other child welfare services programs."**

## Legal Services Provided

### Major DSHS Program Areas

**Children's Services:** The majority of legal services are in litigation-related activities, including initiating dependency cases in which a child has been abused or neglected; filing for termination of parental rights when a child has been out of the home and the parents are unable to care for the child; and taking actions

relating to the licensing of foster homes, group care, daycare facilities, and child-placing agencies. Client advice, for both DSHS headquarters and regional offices, is provided to the Children's Administration, which administers child welfare programs.

**Economic Services:** The Economic Services Administration (ESA) administers public assistance programs, which include temporary assistance to needy families, food stamps, general assistance, Supplemental Security Income (SSI), telephone assistance, and refugee assistance. Litigation ranges from individual appeals of reductions to or denials of benefits to class action lawsuits

challenging program implementation. Other significant issues include the development of agreements with Indian tribes for the delivery of Temporary Assistance for Needy Families (TANF) and Workfirst services on the reservations, confidentiality of client records, electronic application for and delivery of public assistance benefits, ongoing advice on proposed and enacted legislation,

## Social and Health Services Division

**"Legal advice is provided to the state hospitals on a wide variety of issues ranging from patient health care and confidentiality, to contracts for educational services for minor patients at the children's facility, to questions concerning the forensic services unit."**

- and administrative regulations on both the state and federal levels. ESA also administers the child support program. Legal services provided to the Division of Child Support (DCS) include both legal advice and litigation support. Litigation primarily involves class action lawsuits
- ..... challenging administration of the program and representation of DCS in appeals to superior court under the Administrative Procedure Act and in bankruptcy court. Prosecutors generally handle litigation relating to individual child support orders.
- ..... compliance with the federal Medicaid laws; payment rates paid to hospitals and other medical providers; medical services provided; contract disputes with medical providers, including contractual agreements with managed care plans and providers in the Healthy Options program; and Medicaid eligibility issues.
- ..... Chore, and adult protective services); and management services. Attorneys provide legal advice on the interpretation of state and federal (Medicaid) laws that govern DSHS' programs. They also represent the agency in litigation, including, but not limited to, provider licensing actions, provider contract termination actions, and Medicaid rates paid to providers.
- ..... and jury trials at Western State Hospital and Eastern State Hospital. Attorneys represent the state hospitals in civil rights litigation concerning patients' rights to various types of treatment and services. Advice to the Mental Health Division covers such issues as Medicaid and Medicare financing, licensing, and contracts with the Regional Support Networks. Attorneys also represent the Mental Health Division in litigation concerning disbursement of Medicaid funds and reimbursement of community mental health providers.
- ..... and jury trials at Western State Hospital and Eastern State Hospital. Attorneys represent the state hospitals in civil rights litigation concerning patients' rights to various types of treatment and services. Advice to the Mental Health Division covers such issues as Medicaid and Medicare financing, licensing, and contracts with the Regional Support Networks. Attorneys also represent the Mental Health Division in litigation concerning disbursement of Medicaid funds and reimbursement of community mental health providers.
- ..... Litigation has involved complex civil rights challenges by program residents against all aspects of the program.
- ..... Litigation has involved complex civil rights challenges by program residents against all aspects of the program.

## Social and Health Services Division

**Developmental Disabilities:** This DSHS Division operates five residential habilitation centers for the developmentally disabled and contracts with counties and private providers for home and community-based residential and day programs. Legal services involve ongoing advice to division staff on various issues, including eligibility for services, federal reimbursement, program certification, contract issues, civil rights

and right to treatment issues, public disclosure, and adoption of administrative rules and policies. Litigation issues include eligibility and access to services, access to clients and client records by the Washington Protection and Advocacy System, standards of care in institutions and state mental hospitals, right to community placement, and medical decision making..

**Juvenile Rehabilitation:** The Juvenile Rehabilitation Administration (JRA) provides for the care, custody, rehabilitation, and community supervision of court-committed juvenile offenders. JRA operates six institutions, one basic training camp, and seven state-operated group homes. It also contracts out

for additional community residential placements. Legal services to JRA include program advice on a variety of issues, such as terms and conditions of confinement, right to treatment, conditions of parole, public disclosure, and community protection requirements.

### Other Client Programs

**Department of Veterans Affairs:** The Department of Veterans Affairs (DVA) provides residential, financial, and advocacy services to qualified veterans who are state residents, and to veterans' families and survivors. Residential services are offered in two veterans homes serving approximately 550 residents in Medicaid-funded nursing home settings. A third veterans home was recently authorized by the state Legislature, to serve approximately 100 additional residents in Spokane. The state veterans' homes provide 24-hour nursing and assisted living services in addition to medical

and pharmacy services to residents. DVA also offers financial services to veterans by acting as protective payee or fiduciary over income and benefits. DVA staff provide advocacy services to assist veterans in accessing needed state and federal veterans programs. Legal services provided to DVA involve primarily client advice. Recurring topics include eligibility for services, rights of veterans, veterans' home policies and regulations, nature and scope of DVA's fiduciary authority, and federal Medicaid requirements for nursing facilities.

**Department of Services for the Blind:** The Department of Services for the Blind (DSB) provides a range of services to visually impaired individuals to assist them in establishing or maintaining their productivity, employability and

independence. Legal services for this agency consist primarily of client advice on such issues as eligibility for services, interpretation of applicable statutes and regulations, and various other matters

**Office of Deaf and Hard of Hearing Services:** This division of DSHS provides telecommunications access to individuals who are hearing or speech impaired. It

provides telecommunications equipment to eligible persons and contracts out for a telecommunications relay service that provides telephone access to the hearing-

## Social and Health Services Division

**"The number of termination actions has increased substantially over the past five years, and the actions focus more on moving children out of the foster care system and into permanent homes as early as possible."**

- impaired. The Office of Deaf and Hard of Hearing Services also contracts out with regional providers for access programs and advocacy services for hearing impaired persons. The division's primary legal service is to provide client advice on issues such as eligibility, contract formulation and administration, and interpretation of statutes and regulations.
- **Child Welfare Litigation:** As of December 31, 2002, there were approximately 7,500 child welfare cases pending in the Attorney General's Office. Approximately 6,000 are dependency actions seeking court-ordered protection, placement, or supervision of children alleged or found to have been abused, neglected, or seriously endangered by their parents. When it is not possible to reunite children with their parents, legal action is initiated to permanently place children elsewhere. The number of termination actions has increased substantially over the past five years, and the actions focus more on moving children out of the foster care system and into permanent homes as early as possible.
- **Appellate Litigation:** As of December 31, 2002, there were approximately 225 appellate cases pending in state and federal courts. The vast majority of these cases are challenges to lower court decisions in child welfare cases, primarily terminations, but some involve important questions on the state's statutory scheme for protecting abused and neglected children. State appellate courts issued eight published opinions on child dependency issues during 2001, and the department's position was sustained in seven of them. The eighth case involved a narrow construction of a statute that has since been amended. In addition, there were a number of cases involving significant legal challenges to DSHS programs. The major cases are discussed below.
- **Programmatic Challenges:** In recent years, there has been an increase in court challenges to DSHS programs and services. The litigation, generally brought in federal court, is very staff intensive and time consuming. It can result in the judicial system having a greater role in policy making and in potentially significant awards of attorneys' fees against the department.

### ● Number/Trends

- **Child Welfare Litigation:** No single child welfare case by itself may have statewide significance; but, cumulatively, decisions in these cases have a profound impact upon affected children and their families, as well as the community at large. The issues and challenges include determining what is best for children who are abused or neglected by parents, who are not currently capable of meeting their needs; whether the child should be returned home; how frequent visitation should be, if at all; what services the parents should be required to undertake; and finally, whether some parents should have their parental rights severed because they have been unable to correct underlying problems. A tremendous volume of these cases are presented to the courts each year - according to data from the Administrative Office of the Courts, more than 4000 dependency cases were filed on behalf of children during 2002 -- the vast majority of them by AAGs. This represents a modest increase in the number of filings over 2001, most likely due to the apparent increase in the use of methamphetamine.

## Social and Health Services Division

### Significant Cases and their Impact

**Keffeler v. DSHS:** This is a class action brought by foster children receiving financial benefits under Titles II and XVI of the Social Security Act. The Okanogan County Superior Court ruled that DSHS may not use the social security benefits of foster children to help pay for their foster care, even though this practice is approved by the Social Security Administration and followed in every other state. The Washington Supreme Court upheld the trial court in a 5 - 3 decision issued October 11. The state appealed to the United States Supreme Court and, on

February 25, 2003, that court reversed the decision and upheld the department's practice. This ruling saved the department several million dollars annually as well as potentially many more millions of dollars in refunds. More importantly, if the Washington Supreme Court's ruling had stood, it is likely that the foster children who were otherwise eligible for these payments would not receive them because, in most cases, if DSHS does not apply for the benefits on behalf of the children, there is no one else to do so.

**"The Okanogan County Superior Court ruled that DSHS may not use the social security benefits of foster children to help pay for their foster care, even though this practice is approved by the Social Security Administration and followed in every other state."**

**St. John Medical Center v. DSHS:** St. John Medical Center seeks money from DSHS in the wake of the liquidation of a managed care plan known as Unified Physicians of Washington (UPW). The plaintiff provided services to Medicaid clients who were enrolled in UPW's managed care plan. The Insurance Commissioner liquidated UPW, and UPW could not fully pay the plaintiff for those services. St. John Medical Center claims that the department should pay it, given

that UPW cannot. The department denied all liability, noting that it was responsible only for the capitated payments made to UPW for Medicaid enrollees. St. John prevailed on summary judgment and DSHS appealed. The Court of Appeals reversed, holding that DSHS had no obligation other than to pay UPW under the managed care agreement. St. John appealed to the Washington Supreme Court, which declined to hear the case.

**Auburn Regional Medical Center, Inc., et al., v. DSHS:** This case also arises in the wake of the liquidation of UPW. Twenty-eight medical providers who also claim that DSHS should pay them the amounts that UPW could not pay them filed this case,

which involves many of the same legal issues as the St. John Medical Center case above. Based on the appellate decision in St. John, the trial court granted summary judgment to DSHS, and the plaintiffs did not appeal.

**Premera Blue Cross v. DSHS and Health Care Authority and Group Health v. DSHS:** These two cases raise the same issues. Premera and Group Health are managed care organizations that entered into contracts with DSHS under which they would be responsible for ensuring medical services were provided to certain Medicaid recipients and other low-income individuals. Unlike most Medicaid recipients, persons who receive SSI from the federal government are not required to join a managed care plan.

The plans filed their lawsuits based on the belief that DSHS failed to ensure that SSI recipients were excluded from their managed care plans. The plans both assert that medical care for SSI recipients is more costly than medical care for the general population, and seeks recovery of the costs of providing services to SSI recipients. DSHS has succeeded in having five of Premera's claims dismissed on summary judgment. The case is set for mediation in early March 2003.

## Social and Health Services Division

**"Several health care providers who participate in the Medicaid program seek reimbursement for the health care they provided to individuals while they were terminated from the Medicaid program."**

- **Sacred Heart Medical Center v. DSHS:** Several health care providers who participate in the Medicaid program seek reimbursement for the health care they allege that they provided to individuals while they were terminated from the Medicaid program. The providers allege that they are entitled to reimbursement because those individuals' Medicaid eligibility had been terminated improperly based on the clients' termination from the Temporary Assistance to Needy Families cash grant program. Trial is scheduled for April 2003.

- **Townsend v. Quasim:** This class action lawsuit challenges the income eligibility requirements for the state's COPES program, which provides Medicaid funded long-term care services in home and community settings for persons who are otherwise not eligible for Medicaid nursing home care. The plaintiffs claim that the Americans with Disabilities Act (ADA) requires the state to provide them long-term care services in the most integrated setting appropriate to their needs. The U.S. District Court ruled that the COPES income requirement does not discriminate based on disability and that the ADA does not require the state to create new programs or to fundamentally alter existing programs. The plaintiffs have appealed that decision to the Ninth Circuit Court of Appeals, which heard oral argument on September 12, 2002. A decision is expected in 2003.

### **Cases Affecting DSHS Policy Choices and/or Resource Allocations**

- **Braam v. State:** This lawsuit was brought initially as a tort claim, but ultimately converted to a class action on behalf of children currently or previously placed in foster care by DSHS, alleging that their treatment while in the department's custody failed to meet constitutional minimums. Following several weeks of trial, in which the jury was allowed to consider evidence of events from as long as 15 years ago, the jury agreed with the plaintiffs, setting the foundation for the Whatcom County Superior Court judge to order improvements to the state's foster care system. This decision was appealed to the Washington Supreme Court which heard oral argument on November 19, 2002. The court's decision is expected in 2003.

- **Turay v. Weston:** This civil rights action challenges the conditions of confinement at the Special Commitment Center for sexually violent predators. All claims but one were eventually resolved in favor of SCC in 1994. On one claim, the jury found the treatment program was constitutionally inadequate. The federal court appointed a special master who has submitted 19 reports evaluating the progress that SCC has made toward improving its treatment program. On November 15, 1999, the court found DSHS in contempt for failure to make program improvements quickly enough. The most recent injunction hearing was held in December 2002. The primary remaining issue is the establishment of an off-island community transition program for residents who are successfully progressing in sex offender treatment. The federal court has scheduled a further hearing to review the current compliance with the injunction in October 2003.

- **Allen v. Western State Hospital:** This civil rights action challenges the quality of services for developmentally disabled patients at Western State Hospital. This lawsuit followed a finding by the federal government through the Health Care



## Social and Health Services Division

Financing Administration (now Center for Medicare and Medicaid Services) that there were deficiencies in the services provided to developmentally disabled patients. The parties have agreed to a stay of this lawsuit to allow DSHS to implement a three-phase plan to improve services for developmentally disabled hospital patients. A monitoring committee,

whose membership was agreed upon by the parties, has been given full access to the programs. Committee members have been positive about many of the changes made at Western, but a few areas continue to raise concerns. This case will remain stayed until DSHS completes its plan or plaintiffs become dissatisfied with DSHS' implementation of the plan.

**Arc of Washington v. Quasim:** This lawsuit, brought as a class action, alleges that DSHS is violating federal Medicaid law, the ADA, and the equal protection and due process clauses in its management of Medicaid-funded services for clients with developmental disabilities. Plaintiffs claim that DSHS must offer a choice of institutional or community-based residential services to all clients who are eligible for such services under Medicaid. DSHS currently operates those programs within available funds appropriated by the Legislature. Plaintiffs claim that the services are legal entitlements that must be provided to all eligible individuals. The court ruled that no entitlement exists to Medicaid-funded services provided by Division of Developmental Disabilities (DDD) through the Home and Community-

based Services waiver, and that the ADA did not prohibit the state from limiting the number of clients receiving services through the waiver. The parties negotiated a proposed settlement providing for dismissal contingent on agreed-upon increases in legislative appropriations for DDD services in fiscal year 2003 and during the 2004-2005 biennium. On December 3, the court rejected the parties' proposed settlement, ruling that the proposed subclasses had conflicting interests and inadequate representation and that the settlement failed to ensure relief to all class members. The court decertified the class and ordered the case to proceed with individual plaintiffs rather than as a class action. It is anticipated that a trial date will be set sometime in 2003.

**Boyle v. Braddock:** This class action was filed by Columbia Legal Services in U.S. District Court in Tacoma. The complaint identifies four Division of Developmental Disabilities' clients receiving services through its Community Alternatives Program (CAP) waiver, which receives matching funds through Medicaid and must meet certain Medicaid requirements. Columbia Legal Services alleges that DDD does not inform clients on the waiver, whose numbers approximate 11,000, about services available to them, about how to obtain services, and does not provide mandated services with reasonable

promptness. The complaint also alleges that DDD does not provide adequate notice and hearing rights to clients on the waiver. CLS seeks class certification and injunctive relief regarding their claims. On January 18, 2002, the court granted the state's motion to stay the case pending the court's consideration of the proposed settlement agreement in Arc v. Quasim. On December 3, 2002, the court rejected the proposed settlement in Arc and, as a result, lifted the stay in Boyle, and in February 2003, the trial court denied the plaintiffs' motion to have the case proceed as a class action.

**Rust v. Western State Hospital:** This class action lawsuit involved claims of unconstitutional conditions of confinement

for patients detained in the hospital's Center for Forensic Services. Plaintiffs alleged numerous instances of patient-to-patient

**"The parties have agreed to a stay of this lawsuit to allow DSHS to implement a three-phase plan to improve services for developmentally disabled hospital patients."**

## Social and Health Services Division

**"This lawsuit was settled with DSHS agreeing to hire additional staff sufficient to insure that patients receive active mental health treatment and supervision."**

- assaults due to a failure to adequately staff the Center for Forensic Services. In addition, there were allegations related to the building that housed the Center for Forensic Services, which was condemned following the February 2001 earthquake. This lawsuit was settled with DSHS agreeing to hire additional staff sufficient
- to insure that patients receive active mental health treatment and supervision. Progress in implementing the settlement continues to be monitored by two court-appointed experts. A subsequent three and one-half year period of self-monitoring will commence upon completion of the outside monitoring..

- **Marr v. Eastern State Hospital:** This is another lawsuit brought by the Washington Protection and Advocacy System. Like the Allen case discussed above, this lawsuit challenges the statutory and constitutional adequacy of services for developmentally disabled patients, but focuses on Eastern State Hospital (ESH). The substantive
- issues in the case have been settled by the parties. The settlement requires monitoring by a two-person committee selected by the parties for a period of three years. It also explicitly extends the terms of the Allen settlement to class members residing in Eastern Washington.

### Major Events/Issues

- **Anticipated Budget Cuts:** In view of the state's revenue projections, DSHS is developing budget packages that must include very significant reductions in many programs administered by the agency. If some or all of these cuts are enacted by the Legislature, there will
- likely be a significant increase in program-related litigation. Division attorneys are working with agency staff to be positioned to defend decreases in programs and services resulting from reductions in DSHS' budget.

- **Department of Justice Investigation of State Residential Habilitation Centers:** In May 1998, the U. S. Department of Justice (DOJ) initiated two new investigations of state institutions for the developmentally disabled under the federal Civil Rights of Institutionalized Persons Act (CRIPA). CRIPA investigations resulted in a determination by DOJ whether program deficiencies exist which violate residents' civil rights under the constitution and the ADA. An agreement was negotiated with DOJ resulting in an expedited investigative process which should avoid the prolonged investigation that occurred at Fircrest School from 1991-1998. Following a tour of the two state facilities in January 1999, DOJ issued a findings letter alleging civil rights violations at both institutions. DSHS
- challenged those findings while agreeing to pursue program improvements to address significant concerns of DOJ. Follow-up site visits to the two facilities occurred in September and October of 2001. Although DOJ experts acknowledged significant improvements at both facilities, DOJ stated that significant concerns remain, and that DSHS efforts to address those concerns are still underway. Because of this, DOJ stated it anticipates requiring at least one additional site visit to both facilities to evaluate the effectiveness of the new program improvements. DSHS staff is developing alternative proposals to resolve the investigations in lieu of additional site visits. If DOJ insists on additional visits, DSHS must decide to cooperate or force DOJ into court in order to pursue its investigation.

## Social and Health Services Division

**CMS Investigation of CAP Waiver:** The federal Center for Medicaid and Medicare Services (CMS) conducted an audit of DSHS' Community Alternative Program (CAP) waiver, also known as the Home and Community-based Services waiver. This waiver program provides federal matching funds for community-based services for people with developmental disabilities who would otherwise face

institutionalization. The CAP waiver requires compliance with detailed federal standards in order to maintain eligibility for federal funding. The audit of the waiver by CMS staff revealed significant alleged non-compliance issues and identified several millions of dollars for potential recovery from the Department, although CMS has yet to initiate formal proceedings.

# Spokane Division

**"Increased methamphetamine usage in eastern Washington has impacted the type and number of juvenile court cases filed regarding child abuse and neglect, especially in the area of neglect."**

## ● Summary of Responsibility

- The Spokane Division provides a wide range of legal services to many agencies of state government and state institutions of higher education in eastern Washington.
- Additionally, nearly all consumer protection functions for the eastern half of the state are located in the Spokane

Division. The Spokane Division consists of 27 assistant attorneys general and approximately 55 additional staff including legal assistants, paralegals, investigators, professional support staff, law students, volunteers, and other students.

## ● Legal Services Provided

- Spokane attorneys are assigned to one of three sections: Social & Health Services, Labor & Industries and the Spokane Interdivisional Section.

several other eastern Washington counties.

- Social & Health Services: Some of the state agencies served by our Social & Health Services Section are the Division of Children & Family Services, Aging and Adult Services, Division of Child Support, Community Services Offices, and Eastern State Hospital. They also handle various licensing matters including day care, foster care, boarding home, and adult family home facilities.
- Labor & Industries: This section handles industrial insurance appeals and cases involving the Washington Industrial Safety and Health Act before the Board of Industrial Insurance Appeals and in the trial courts in Spokane County and

- Spokane Interdivisional Section: This section handles consumer protection matters, representation of institutions of higher education including Eastern Washington University, Big Bend Community College, Educational Service District 101, Community Colleges of Spokane, Labor and Personnel matters for state agencies in eastern Washington, and defense of tort actions filed against the state, agencies, and employees.

The Spokane Division also represents the Spokane Intercollegiate Research and Technology Institute involving technology transfer and economic development helping companies take science to the market place and the Eastern Washington Historical Society.

## ● Numbers/Trends

- Increased methamphetamine usage in eastern Washington has impacted the type and number of juvenile court cases filed regarding child abuse and neglect, especially in the area of neglect.

Approximately two child abuse cases are filed each working day. This trend has led to an increase in cases terminating the parental relationship.

## Spokane Division

Consumer protection calls to the Spokane Division are fairly constant ranging from 900 to 1,200 per month focusing mainly on auto repair, auto sales, and telecommunication issues.

Tort claims assigned to Spokane have increased and range from simple slip and fall cases to wrongful death and civil rights violations.

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### Significant Cases

Information about significant cases is reported elsewhere in this report under the

division heading of the substantive legal work that is handled in Spokane.

# Tacoma Division

**"The division has partnered with Pierce County Superior Court, Department of Assigned Counsel of Pierce County, Pierce County Alliance, and the Division of Children and Family Services Region 5 to develop a nationally recognized Family Drug Court."**

## ● Summary of Responsibility

- The Tacoma Division provides a wide range of legal services to many agencies of state government. The Tacoma Division consists of 26 assistant attorneys general and approximately 26 additional staff including legal assistants, paralegals, and other professional support staff. Our
- General Service staff of 4 provide quality reception, supply ordering, copy projects and other support to this office of 52, as well as to an additional two sections, Consumer Protection and Medicaid Fraud.

## ● Legal Services Provided

- Tacoma attorneys are assigned to one of the three sections: Social & Health Services, Labor & Industries, and Licensing & Administrative Law.
- Social & Health Services: Some of the state agencies served by our Social & Health Services Section are the Division of Children and Family Services and Aging and Adult Services. They also handle various licensing matters including day care, foster care, boarding home, and adult family home facilities.
- Labor & Industries: This section handles industrial appeals and cases involving the Washington Industrial Safety and Health Act before the Board of Industrial Insurance Appeals in the trial courts in Pierce and Kitsap County.
- Licensing & Administrative Law: This section represents the Employment Security Commissioner in unemployment appeals in Kitsap and Pierce Superior Courts. This section represents the Department of Licensing in Kitsap and Pierce Superior Courts appeals of license revocations of suspensions.

## ● Numbers/Trends

- Increased methamphetamine usage in Pierce and Kitsap County has impacted the type and number of juvenile court cases filed regarding child abuse and neglect, especially in the area of neglect.
- Approximately two child abuse cases are filed each working day. This trend has led to an increase in cases terminating the parental relationship. The division has partnered with Pierce County Superior Court, Department of Assigned Counsel of Pierce County, Pierce County Alliance, and the Division of Children and Family Services Region 5 to develop a nationally recognized Family Drug Court. In that court over 100 people will be served with the goals of treating the parents of their chemical addiction while working hand-in-hand towards the best interests of their children.

## Tacoma Division

### Significant Cases

Cases of significance and major issues and events are included in the main divisions' reports.



# Transportation and Public Construction Division

**"The division's workload can vary depending on the level of investment in new or expanded transportation projects and the level of construction undertaken by client agencies."**

## ● Summary of Responsibility

● The Transportation and Public Construction Division (TPC) represents the Washington State Department of Transportation (DOT) as it designs, constructs, operates and maintains Washington's highway system and other multi-modal transportation operations (Washington State Ferries, rail, aviation, freight transport, public transportation, etc.). Other division client agencies include: the Washington Transportation Commission, the Board of

Pilotage Commissioners, the County Road Administration Board, the Transportation Improvement Board, the Washington Traffic Safety Commission, and the Freight Mobility Strategic Investment Board. Division attorneys also use their experience in eminent domain, contracts, construction, land use and environmental law to support the construction activities of other state agencies.

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## ● Legal Services Provided

● TPC's workload is a mix of moderate to complex litigation and client advice on a wide range of issues. In addition to a steady condemnation caseload, TPC attorneys handle construction claims and environmental litigation, both regulatory compliance and defense of hazardous waste claims, as well as land use issues that arise in connection with state projects. In addition, division attorneys handle a number of tort cases seeking

recovery of property damage allegedly caused by floods and landslides. Client advice topics range from land use planning and land management issues, like the leasing of DOT right-of-way to private cellular telephone companies, to the legality of disadvantaged business enterprise contracting goals and resolving jurisdictional disagreements between federal, state, local and tribal entities.

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## ● Numbers/Trends

● The division is currently handling 255 open lawsuits and appeals with an equally active client advice practice.

● The division's workload can vary depending on the level of investment in new or expanded transportation projects and the level of construction undertaken by client agencies. We have seen dramatic growth in the division's advice in project construction due to accelerated project planning, mega-project scoping (I-405, SR 520 Floating Bridge, Alaskan

Way Viaduct, Sound Transit), unusual environmental impacts and mitigation strategies, and new project delivery methods (like design-build contracting) which present complex and novel legal questions.

The division has also seen growth in its environmental and land use practices as claims arise under the Endangered Species Act, Clean Water Act, SEPA and NEPA as transportation construction proceeds. Environmental permit streamlining



# Transportation and Public Construction Division

issues and land use requirements from a large number of local jurisdictions faced with state highway construction have also increased demands on our environmental and project litigation teams.

The division also handles construction and environmental/land-use mediation

and litigation for agencies other than DOT. Recent cases involve prison construction by the Department of Corrections, sexual offender transitional facilities for DSHS, \$7 million in claims related to the construction of a historical museum near Spokane, and claims against DSHS related to Western State Hospital construction.

**"In 2002, division attorneys resolved 29 cases, acquiring \$41 million worth right-of-way for DOT construction projects around the state."**

## Significant Cases and Their Impact

**DOT Condemnations:** In 2002, division attorneys resolved 29 cases, acquiring \$41 million worth right-of-way for DOT construction projects around the state.

**Stafford Creek Correctional Center:** TPC is currently working with specially appointed assistant attorneys general to prepare for \$25 million construction claims from a prime contractor and 12 sub-contractors regarding change orders and terms in a prison construction contract. Division attorneys are also assisting in the mediation phase of a second layer of construction claims totaling about \$4 million.

**Second Narrows Bridge:** Division attorneys have handled a number of permit appeals, public disclosure, finance contract negotiation and other legal matters relating to the public-private nature of this project.

**WSDOT v. Seacoast Towing:** Division attorneys have worked with DOT to recover nearly a million dollars in taxpayer funds used to repair the SR 520 floating bridge after a barge hit it a couple of years ago. Despite intensive negotiations, litigation with the barge owner and its insurance company was required.

**Construction Contract Claims:** Division attorneys devote considerable time to avoiding and resolving claims from contractors on highway construction projects. Nonetheless, each year a number of such claims are presented by contractors seeking recovery for cost overruns. Many claims are settled either through negotiations or as a result of a Dispute Review Board hearing, but only after substantial preparation for the possibility of litigation.

## Major Issues/Events

**Environmental Issues:** As DOT projects continue to impact both the natural and built environment, the division is experiencing a growth in its permit-related advice and litigation caseload. DOT has a collaborative working relationship with the Washington State Department of Ecology and lawyers for each assist that effort regularly.

## Transportation and Public Construction Division

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| <p><b>Washington State Ferry Security After 9/11:</b> Division lawyers have worked with the United States Coast Guard and Washington State Patrol to facilitate a</p>  | <p>collaborative approach to ferry security which recognizes the law, limited financial resources and viable security information.</p>   |
| <p><b>Accelerated Projects/Changing Project Delivery:</b> With the current pressing demands for transportation improvements and the need for expansion and maintenance projects to happen quickly to maximize economic stimulus and restore needed infrastructure, the division has advised project managers on a wide variety of mega-project design-build issues, risk</p> | <p>allocation, innovative construction claims processes, unique financing arrangements, ballot measure impact (e.g. I-776), and multi-party operations initiatives with private and public parties (e.g. Sound Transit). The failure of Referendum 51, and the potential for other financing strategies, has presented a variety of legal issues for division attorneys.</p> |

# Utilities and Transportation Division

## Summary of Responsibility

The Utilities and Transportation Division provides legal services to the Washington Utilities and Transportation Commission (WUTC). The commission regulates, in the public interest, the rates, services, and practices of privately owned utilities as well as a number of transportation

companies doing business in the state. These include telecommunications, electric, gas, and water companies as well as pipeline companies, solid waste companies, private ferries, buses, and certain aspects of railroads, such as rail crossings and train speeds.

## Legal Services Provided

The division principally handles regulatory litigation. The division represents the commission in court, both on appeals from commission decisions and in original actions, as well as in proceedings before various federal agencies, including the Federal Energy Regulatory Commission (FERC) and the Federal Communications

Commission (FCC). The division represents the commission's staff in rate proceedings and other regulatory actions before the commission. It also assists in the disposition of more than 1,500 formal filings considered annually by the commission.

## Numbers/Trends

The division currently is handling 15 cases in state and federal courts (including two state Supreme Court cases) and 19 formal federal administrative agency cases (not including participation in rulemaking proceedings before the FCC and the FERC). In addition, the division is handling a large number of administrative cases before the WUTC, ranging from complex rate and pricing proceedings to smaller cases

impacting only a few consumers. The vast majority of matters before the commission are resolved without formal adjudication. They are either non-controversial or resolved through negotiation or other alternative dispute resolution processes. Finally, many matters are resolved at the regularly scheduled open meetings of the commission.

## Significant Cases

**Qwest Entry Into Long Distance:** Section 271 of the federal Telecommunications Act of 1996 allows former Bell operating companies, such as Qwest, to offer interLATA (state-to-state or between regions within a state) long distance

service once they have removed barriers to competition in local telephone markets. Section 271 sets forth a 14-point checklist that Qwest must satisfy to prove that it has done so before it will be permitted to offer interLATA long distance service. The

**"The division represents the commission in court, both on appeals from commission decisions and in original actions, as well as in proceedings before various federal agencies, including the Federal Energy Regulatory Commission (FERC) and the Federal Communications Commission (FCC)."**

Utilities and Transportation Division

"Over the past year, the bulk of the division's work has been in the energy area."

- commission recommended to the FCC that the FCC approve Qwest's application, under Section 271, to enter the interLATA market.
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- **Rate Cases:** The division handled three significant rate cases in 2002. Two electric and gas utilities (Avista and Puget Sound Energy) and one pipeline company (Olympic) filed for emergency and general rate relief. The petitions for relief were driven, in part, by the energy crisis. Olympic has petitioned for judicial review of the commission's decision on its rates.
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- **Revenue From Directory Publishing:** Qwest filed with the commission a petition to sell its directory publishing business (Qwest Dex) for \$7.05 billion. The directory business contributes approximately \$100 million per year - or \$3 per line, per month - to covering the operating costs of the telephone network in Washington.
- 
- **Customer Privacy:** The commission adopted new customer privacy rules for telecommunications companies. The rules protect a customer's most sensitive information about whom, when, and where they call. The rules are considered the strongest in the nation in how they restrict the use of calling pattern information. Verizon has challenged the commission's rules in federal court and has obtained a preliminary injunction limiting the commission's enforcement of them. The court likely will not rule on the merits of Verizon's claim until summer 2003.
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Major Issues/Events

- **Energy Regulation:** Over the past year, the bulk of the division's work has been in the energy area. In addition to the rate cases mentioned above, the FERC issued a Standard Market Design Notice of Proposed Rulemaking that would require: all electric utilities to turn over control of their transmission facilities to a regional transmission provider; a single tariff for all transmission customers, including bundled retail customers; and uniform rules for wholesale electricity markets throughout the United States. The FERC's proposed rules on standard market design are highly controversial, particularly in the western United States.
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- **Competition in Telecommunications Markets:** The commission is implementing state and federal pro-competitive policies by relaxing regulatory requirements for "competitive" companies and "competitive" services and allowing flexible pricing. In addition, the commission is continuing proceedings to determine the costs and prices that telecommunications companies may charge their competitors.
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# **Professional Services**

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# Administration Division

**"Budget annually processes 3,000 legal services billings to state agencies, boards and commissions. These billings provide revenue to support legal operations of approximately \$75 million annually."**

● **Summary of Responsibility**

- The Administration Division provides nonlegal services for the Attorney General's Office and is divided into six offices: Fiscal and Budget, Human Resources, Facilities, Information Services, Law Library and Public Affairs.

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● **Services Provided**

- Support services include centralized budgeting and accounting, personnel and training, library resources, planning and technical support for the office's computer systems, management of the office's buildings, internal and external communications and general office administration.

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● **Numbers/Trends**

- **Fiscal/Budget:** The Fiscal Office is divided into four sections -- Accounting Services, Budget, Payroll and Purchasing.
  - Accounting Services annually processes approximately 145,000 transactions for vendor payment and employee travel reimbursement.
  - Budget annually processes 3,000 legal services billings to state agencies, boards and commissions. These billings provide revenue to support legal operations of approximately \$75 million annually. In order to bill client agencies, approximately 9,000 staff timesheets are processed each year. The unit monitors approximately 165 client budgets. In addition, the unit provides expenditure and revenue monitoring and support for 69 separate divisions within the AGO. The unit also prepares and submits approximately 100 fiscal notes each biennium.
  - .....
    - **Human Resources Office:** The Human Resources Office received and processed approximately 1,503 applications for employment in 2002. More than 454 applications were submitted for attorney positions, while approximately 321
- Payroll processes a semi-monthly payroll for approximately 1,200 employees (including work-study students and law clerks) totaling \$2.57 million, or an annual total of about \$61.7 million. The Unit also processes an average of 2,681 leave slips per month and an average of over 32,172 per year. Over 2,150 timesheets are processed annually for the part-time and work-study employees (this figure does not include times sheets for volunteers).
- Purchasing processes approximately 700 field/purchase orders annually. They also process 2,800 invoice vouchers for other types of purchases. The Supply Center takes advantage of volume purchases which saves the agency over \$2,000 annually.

## Administration Division

applications were received for law clerk positions. From the applications received, the office appointed approximately 26 attorneys, made offers to 8 third-year law students for 2003 and made 38 offers for law clerk positions. Approximately 67 appointments were made into Washington General Service in 2002.

Training staff in the Human Resources Office coordinated 360 classes in 2002 with a total attendance of 6,300. The 360 classes included 28 continuing legal education courses, 34 specialized legal classes for professional staff on topics such as court procedures, and management/supervisory training for the attorney manager and lead professional staff. Training classes utilizing in-house expertise also included 105 computer technology classes, 89 library research/legislative history classes, 20 classes on humanresourcesmanagement/supervision, 17 fiscal related classes, 5 ethical standards classes, 7 sexual harassment awareness and prevention classes, 11 safety and wellness classes, 30 seminars on state retirement and deferred compensation plans and 2 sessions on the civil service reform act. In addition, 665 employees participated

**Facilities:** The Attorney General's Office operates 19 facilities across the state. Staff members are also housed with client organizations at six additional locations including major universities, state agencies and regional juvenile detention facilities. Together they house over 1,100 employees at an annual lease cost of nearly \$10 million.

The agency continues its long-range goal to consolidate its Thurston County offices. Preparations are underway to relocate the Revenue Division into a facility with

**Information Systems:** The office's computer network is comprised of 60 individual Local Area Networks, a Metropolitan Area Network serving the

in training classes outside the Attorney General's Office, including 40 electronic learning (e-learning) participants. Twenty-seven staff participated in the tuition reimbursement program, which reimburses them for courses taken at colleges and universities.

The Human Resources Office manages a highly successful peer-driven employee recognition program for tenure and outstanding achievement. In 2002, the Attorney General recognized 37 employees for their extraordinary contributions to the office in fulfilling its mission, and 175 employees were recognized for their length of service to the state.

Human Resources staff completed over 60 workstation ergonomic assessments this past year. Human Resources staff have worked in concert with division managers to assure accommodations were made for 19 employees with disabilities. Four facility issues were also successfully addressed. Twenty Labor and Industries claims were filed by employees in 2002 and 27 on the job incident reports were recorded.

three other divisions in coming months. A space request is also being developed to consolidate four major offices into a single location in the 2006-2007 timeframe.

At the present time, the highest priority is on the security of agency employees, records and facilities. This year nearly every office has seen significant improvement in building and program safety. A new Safety and Security Policy has been instituted, and a new Agency Safety and Security Committee convened.

greater Olympia area and a high-speed backbone serving the Seattle, Spokane and Olympia computing centers.

**"At the present time, the highest priority is on the security of agency employees, records and facilities."**

Administration Division

**"ISD currently maintains 2,022 electronic mailboxes and calendars and 12.8 million stored messages."**

- The office network contains 43 high capacity servers with a total storage capacity of 3.8 terabytes. Currently there are over two million user files maintained on the networks that use 2.3 terabytes of the office's server capacity. The network experienced a 99 percent uptime last year.
- ISD currently maintains 2,022 electronic mailboxes and calendars and 12.8 million stored messages.
- ISD maintains 22 telecommunications systems supporting 1,182 users, 1,268 voice mailboxes and 1,876 separate phone lines.
- ISD Customer Support processed 14,335 Call Center contacts last year.
- ISD managed over 400 special service requests in 2002.
- ISD managed the acquisition and installation of more than \$3.5 million of computer hardware and software.
- ISD held 103 classes, offering ten different technical training courses, to 603 students in 2002.

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**Library:** Two research librarians provided reference assistance and in-depth research services to the more than 500 attorneys and paralegals. An initiative instituted last year to provide Washington Legislative Histories, upon request, for the AAGs has become very popular and saves AAGs significant research time. Staff continues to centrally order, check-in and distribute all publications ordered by office staff.

The responsibilities for the acquisition (purchase) of research materials has been added to the duties of the technical services librarian, who serves as the project manager for our integrated library system. Onsite preparation for the roll-out of the new system has been completed. The circulation, serials and acquisitions modules are being populated and are functioning up to expectations. Final preparations for desktop access to the electronic catalog, WAGOcat, was completed.

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**Public Affairs:** Public Affairs worked with the Attorney General's Domestic Violence Awareness Committee to produce a new web site devoted to informing young people, parents and teachers about the problem of teen dating violence. Public Affairs also supported the Attorney General's kickoff of the SafetyNet Campaign, a multi-faceted effort to educate children and consumers about ways they can protect themselves from criminals and con artists on the Internet.

Public Affairs completed a major redesign and upgrade of the Attorney General's Office website to make the rapidly growing site more visually appealing and easy to navigate. The new website also increased the amount of general information to the public in order to improve services to the growing number of constituents who contact the office through the website.

Press release distribution procedures were updated in 2002. The biggest change involves use of Listserv, a service from the



## Administration Division

Department of Retirement Systems. The system automatically sends releases as an e-mail to anyone who signs up. To date, more than 350 individuals or organizations have signed up, with more than half being non-media.

Public Affairs staff worked with ISD to bring broadcast capabilities to the AGO Intranet. This will improve communications with staff, allow better staff briefings on projects, such as computer upgrades, and bring training programs to the desktop - all at less cost and in a more timely way.

- Prepared and distributed more than 62 news releases.

- Responded to an average of 15 media calls each day.
- Researched and wrote an average of four major Attorney General speeches each month.
- Responded to approximately 700 constituent phone calls, letters and emails per month.
- Provided graphic design and webmaster services to the office.
- Produced Good Morning AGO, a daily electronic newsletter distributed via the agency's Intranet. Good Morning AGO provides internal news, announcements and other information of interest to Attorney General staff, as well as a daily briefing of newlinks to relevant articles published on newspaper websites.

**"The Constituent Correspondence Notebook manages non-legal correspondence and provides a means for monitoring the office's responsiveness to those contacts."**

## Major Issues/Events

**Windows 2000 Upgrade Completed:** ISD upgraded over 1,400 desktops and laptops to the Windows 2000 operating system last year. The upgrade included replacing over

400 machines and upgrading memory on over 800 machines. It also included upgrades to virus protection software, Internet browsers, and Outlook e-mail.

**Constituent Contacts:** ISD completed the implementation of a new Case Management System sub-system to handle constituent contacts. The Constituent

Correspondence Notebook manages non-legal correspondence and provides a means for monitoring the office's responsiveness to those contacts.

**Securing HITS/SMART:** ISD moved the HITS/SMART data processing infrastructure from Seattle to Olympia. ISD also implemented a secure Citrix network for the local law enforcement

agencies that use the systems. Back-up processes to protect data were implemented as well as programs to optimize software licensing.

**Prime Migration:** The Consumer Protection Lemon Law system has been successfully transitioned to the Law Manager environment. ISD Purchasing system has also been redeveloped for the

LAN environment. The only remaining system on the office's old Prime computing environment is the agency's inventory system.

**Administrative Services Intranet:** ISD continues to coordinate the development of an office-wide Administrative Services Intranet. This project seeks to allow AGO employee access to specific services offered by the Human Resource

Office, Fiscal Office, Information Service Division, Law Library, Public Affairs and General Services. The site's architectural design has been completed and staff are working on constructing the site and developing its content.

## Administration Division

**"The office has experienced a serious shortage of professional support staff, especially legal secretarial staff in the Seattle Office and some regional offices."**

- **Office XP and Agency Brief Banks:** ISD has begun the preliminary work for an Office Suite upgrade from Microsoft Office 97 to Microsoft XP. Included in this upgrade will be the implementation of Microsoft Sharepoint software for establishing an office-wide document repository for attorney work product.
- **Ergonomic Assessment Training:** Human Resources staff developed an Ergonomic Assessment Training Program to train divisional representatives on how to conduct ergonomic assessments in their respective divisions. Eighteen representatives attended the training.
- **Recruitment Challenges:** Recruitment difficulties are on the rise in the legal field. The office has experienced a serious shortage of professional support staff, especially legal secretarial staff in the Seattle Office and some regional offices. Solving these issues is a complex task and one that will continue into the coming years. A recruitment and retention manager has been appointed in the Seattle Office, with primary responsibility to market the legal profession and the office and work closely with high schools and community colleges to recruit high quality candidates. The recruitment manager has successfully recruited several good candidates from legal secretarial programs. In addition, the HR staff is administering the State Civil Service exam for legal secretaries on site in the Seattle Office. Several other projects and reviews are currently in progress to further define the problem and develop viable solutions.
- **Assignment Pay:** Human Resources staff, in concert with the Department of Personnel, initiated a creative approach to combat severe recruitment and retention problems for legal secretaries in our Seattle Office. The office was successful in justifying the expansion of assignment pay rules to include recruitment and retention problems in high cost-of-living areas. These rules were adopted by the Personnel Resources Board on a pilot basis and will be considered for permanent adoption in 2003.
- **Civil Service Reform:** The office continues to work with employees to develop a new legal support plan. The plan is intended to reflect changes in technology, provide new challenges and career opportunities for employees, and improve the delivery of legal services. After extensive work with employees, the office is now working to ensure the plan will conform with changes brought about by the Civil Service Reform bill adopted by the Washington State Legislature. This bill calls for a major overhaul of the current civil service system, which includes classification, compensation and administrative rules. The bill also greatly expands the scope of collective bargaining and allows for competitive contracting out of services traditionally provided by state employees. The Attorney General's Human Resources staff have been and will continue to be actively involved in the development and implementation of these sweeping changes to the state's civil service system. HR staff have developed communications plans to keep employees updated on the progress of civil service reform.
- **Resource Sharing Program:** A program for Sharing Professional Staff Resources was implemented office-wide. This program was developed to maximize professional staff resources and expertise within the office by using staff from one unit to help another division meet critical needs. Due to budget cuts and

## Administration Division

staff reduction priorities, the office is continually looking for new ways to utilize its resources in the most efficient and effective way. The goal of the program is to provide extra help to a division when

there is a staff shortage, high priority project or a spike in workload. To date, we have 14 active resource sharing requests, and eight completed resource sharing requests.

**On-Line Catalogue System:** The Law Library has spent a great deal of time during the past year creating an online catalog for the office. WAG-O-Cat is an Internet-accessible catalogue of the Law Library's collection and (eventually) the

library collections of all of the office's divisions. This will enable access to and use of shared materials -- facilitating research and assisting the divisions in maintaining and developing their own collections.

**Electronic Travel Vouchers:** Fiscal and ISD staff have completed preliminary work needed to utilize OFM's electronic

travel voucher program. A pilot program is planned for early 2003.

**Safety Assessment:** The office completed a safety assessment of all offices in 2002.

The goal was to bring all offices up to basic safety levels.

**L&I Staff Consolidation:** Beginning in July, support staff in the L&I Division began moving to the AGO payroll. L&I

was the last of the non-higher education clients to have AGO professional staff on its payroll.

# Policy and Government Relations Unit

**"The Policy and Government Relations Unit led the Attorney General's public education efforts on Internet and high-tech crime."**

## ● Services Provided

- The Policy and Government Relations Unit helps develop AGO policy initiatives and legislation. The unit also serves as the AGO liaison with stakeholders, the Legislature, Congress and the National Association of Attorneys General.

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## ● Initiatives

- **High Tech Crime:** The Policy and Government Relations Unit led the Attorney General's public education efforts on Internet and high-tech crime. Launched in October 2002 and to be continued into 2003, Attorney General Gregoire began her tour of communities statewide to talk with students, parents and law enforcement about the potential physical and financial pitfalls of the Internet.  
The unit built partnerships with statewide law enforcement organizations, organized the day's events in each community, developed two community-specific PowerPoint programs targeting middle-school students and parents respectively, drafted new legislation to amend the state Communication with a Minor statute, and contributed to the AGO Safety Net webpage and Internet-themed speeches. In addition, the unit developed and managed a statewide ListServ for law enforcement to share information or post inquiries on electronic crime. It continues to be an active partner with stakeholder organizations on computer and technology-related issues.
- **Anti-Bullying:** The unit helped draft the model policy on bullying as mandated by SHB 1444, the anti-bullying bill. To help prepare schools, it worked with the Office of the Superintendent of Public Instruction and the Washington Association of School Principals to design the anti-bullying training and participated in some of the early trainings. In addition, the unit organized a series of anti-bullying discussions with students in the West Valley School District in Spokane.
- **Tobacco:** The unit contributed personnel to assist NAAG in enforcement of the tobacco Master Settlement Agreement in the spring and summer, achieving concrete results in those enforcement efforts. The unit led the successful effort to stop one advertising campaign and assisted NAAG in dealing with numerous other economic, enforcement, and legislative issues. Staff regularly represented the office on tobacco-related issues with stakeholders and the media.
- **Risk Management:** The unit worked with the Office of Financial Management and other agencies to implement the package of risk management legislation passed by the Legislature in 2002. The effort included loss prevention reviews and the implementation of non-legislative recommendations.

## Policy and Government Relations Unit

**Bill Drafting Guide:** The unit led the task force to design a new section of the Legislature's Bill Drafting Guide addressing risk management and

suggesting how to avoid unintentionally creating new tort liability for the state. The new section will be published in time for the 2003 legislative session.

**Prescription Drugs:** The unit has partnered with AARP Washington on a

prescription drug education effort to be launched in 2003.

**NAAG Internet Conference:** The unit is the lead on developing the agenda and focus for the NAAG Internet Conference to be held in Seattle in the spring of 2003. The conference is part of an on-going

initiative by the National Association of Attorneys General to focus on developments in technology as related to the internet and its impact on consumers and law enforcement.

### Legislation

The unit brought 12 request bills to the 2002 Legislature, one of the largest-ever Attorney General request packages. The

office was successful in getting seven of the twelve enacted into law.

**Anti-bullying:** This bill emanated from the discussions AG Gregoire had with students in schools throughout Washington and the nation in 1999 and 2000. Home life and bullying were listed by students as the top two leading causes of violence in

the schools. Among other things, the new law requires schools to develop policies prohibiting harassment, intimidation, and bullying on school grounds and activities.

**Protection from Disclosure Certain Public Records:** The 9/11 terrorist attacks and the spread of anthrax through the mail caused a reevaluation of sensitive public records that could aid terrorist attacks. Among other things, the new

law exempts from inspection certain: vulnerability assessments, response deployment plans, records currently prohibited from disclosure by federal law, and notes or summaries from national security briefings.

**Risk Management:** The Washington Risk Management Task Force, formed by AG Gregoire and Governor Locke, specified a list of recommendations to help protect the public and reduce the number of multi-million dollar lawsuits against the state. Three of its recommendations required legislation. The AGO shepherded the three bills through the legislative process and into law.

accountability especially in the budget process.

- **Movement of the Risk Management Office to the Office of Financial Management.** This move raised the priority of risk management and agency

- **Allow Expression of Regret:** This new law allows state agencies involved in serious incidents or losses would be free to express regret to clients and family members without fear that it would be used against the agency in court.

- **Permit Post-Incident Reviews:** This new law allows agencies to conduct post-incident reviews of major incidents without fear the findings will be used against them in court.

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**Credit Scoring:** Most insurance companies formerly used a misleading and unfair practice called credit scoring to determine a consumer's ability to make a loan payment or to determine how much a person must pay for insurance

or a loan. The new law prohibits credit scoring to deny, cancel, or fail to renew an individual's personal line of insurance. Further, a consumer's credit score cannot cause more than a 20 percent difference in premiums.

**Redistricting:** This legislation combined the statutory and constitutional redistricting deadlines to a single date of January 1, of each year ending in two. The legislation

brought the work of the Redistricting Commission in compliance with the law and constitution.

# Office Locations

